The Role of the Judge and Jury in Complex Trials

by

Robert F. Julian

A thesis submitted in fulfillment of
the requirements for the degree of

Ph.D.

Queen Mary University of London

2008
Professor Peter Alldridge

STATEMENT

The work contained herein is the candidate's own. A survey of lawyers and judges which is primarily analyzed in Chapter 8 and which constitutes Annexes A and B were drafted by the author, modified by Elissa Krause of the New York State Office of Court Administration, and ultimately was a collaborative work product. The New York State Office of Court Administration provided a website for the distribution of the surveys. The candidate mailed and tabulated the mailed surveys. The Office of Court Administration tabulated the surveys and assisted in the statistical analysis. The statistical analysis, including findings, is a collaborative effort of the candidate and the court system. The policy analysis and inferences drawn in Chapter 8 is the candidate's own. This collaborative effort permitted the candidate unique access for survey purposes to judges and lawyers. The candidate's policy analysis has been provided to the Office of Court Administration for their use as institutional research.

The candidate would like to thank the Honorable Ann Pfau, Ellisa Kraus, and Chip Mount of the New York State Office of Court Administration. Dr. David Ormerod who has reviewed Chapter 9. Tracey Mills, Mary Townsend, and Paula Eannace of the New York State Court system who provided logistical assistance and review. The candidate is grateful to Judges nos. 1-9 of England and Wales and to the candidate's colleagues on the New York State Bench and in the American College of Trial Lawyers. The candidate also thanks the American College of Trial Lawyers for permitting New York fellows of the College to be surveyed.

The author wants to acknowledge the contributions of his K9 companion, Caesar Augustus and his capable assistants Nelson A. Rockefeller and Huey P. Long.

Finally, the invaluable advice, counsel, and friendship of the candidate's thesis supervisor, Professor Peter Alldridge is gratefully acknowledged.

ABSTRACT

This thesis examines the mode of trial concerns in the U.S.A., New York State, California, England and Wales and Canada --specifically the ability of the jury to comprehend complex cases and the perception/reality that bench trials may not be as fair as jury trials. Defining complex cases as those involving serious fraud indictments, capital murder trials, and lawsuits or indictments against corporations and their managers, the thesis examines problems associated with jury trials in such cases. It evaluates the comparative law and customs and practices regarding the use of juries, emphasizing problems with jury selection, deficits in jury deliberation and post trial problems associated with jury verdicts. The thesis also evaluates the judge only trial, attempting to determine whether a state imposed non jury trial in a criminal case as is presently proposed in the England and Wales Parliament creates an unfairness to the defendant because bench trials significantly differ from jury trials in the application of the rules of evidence and in the role of the judge.

The thesis reports on the results of a survey of New York State trial judges, a like survey of New York State lawyers, and the opinions of nine England and Wales judges authorized to try serious fraud cases who were interviewed regarding these issues. The surveys and interviews finds that there is a high degree of support for jury verdicts expressed by the judges, examines evidentiary and pretrial practices in both modes of trial and attempts to evaluate whether claims of procedural flaws and prejudice in bench trials by respected academics are accurate.

The thesis concludes by affirming the competence of juries to try complex cases, proposing modifications to post jury verdict procedures to evaluate jury misconduct and advocating that the bench trial evidentiary rules and conduct rules become comparable to the jury trial. The thesis recommends that mode of trial choices be given to the defendant, advocates that when a bench trial is selected that peremptory challenges of the trial judge be permitted and postulates that these reforms will make the bench trial a more attractive alternative to the jury trial in complex cases.

The Role of the Judge and Jury in Complex Trials

CHAPTER 1

INTRODUCTION

"The first objective of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and then the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of his countrymen." Lord Devlin, Trial By Jury (1966)

I. Overview

The right to a jury trial is the major distinguishing factor between civil law jurisdictions and common law jurisdictions. America's veneration of the right to a trial by jury is historic and reflected in the 6th and 7th Amendments of the U.S. Constitution as well as virtually every State Constitution. Canada provides constitutional protections of trial by jury in criminal cases, but not in civil. England and Wales accords those charged with serious crimes a trial by jury, but it is not a constitutional right. England and Wales does not ensure or provide such a right in most civil lawsuits. Many influential voices within these jurisdictions (the comparator jurisdictions) doubt juries, particularly in complex cases, preferring trial by judge. The difference in opinion regarding the soundness of jury verdicts as well as a difference in philosophy has fueled virtually continuous debates in the U.S.A. and England and Wales about the strengths and weakness of each mode of trial. In England and Wales a majority of the House of Commons holds the position that serious frauds cases are appropriate for a judge imposed bench trial. In the U.S.A. not only is jury capacity to decide capital punishment cases in serious question, it is argued by jury detractors that some cases are too complex to receive a constitutional trial in

commercial and corporate civil and criminal cases. Canada offers far less controversy but is a helpful comparator in key parts of this work because it is a hybrid of the England and Wales and U.S.A. justice systems.

As a preliminary matter, any examination of complex trials must begin with a definition of complexity, recognizing that complexity is notoriously difficult to define and thus, the definition set forth herein is the outgrowth of the research conducted in this thesis. The definition is not easily obtained with uniformity in the comparator jurisdictions, but recurrent factors that constitute complexity are readily discernible.

They are:

a) the fact pattern is complicated.

b) the indictment involves a number of discrete acts or facts;

c) the law to be applied by the trier of fact is complicated or difficult to understand;

d) there are conflicting expert theories in the area of science, finance, accounting or forensics;

e) there are a number of fact witnesses, documents and other evidence that will extend the trial for many days.

f) the case is wrought with emotion or with political implications.

g) capital punishment cases.

h) serious fraud cases.

For example, Hans, Kaye, et al examine juror comprehension using mock juror responses to presentations regarding contrasting DNA evidence, testing how jurors understand and apply scientific evidence.[1]

Vidmar used American civil medical malpractice cases as a complex subject matter to measure jury function.[2]

In England and Wales, it is the view of the present government that "juries do not make good fact finders in cases involving complex financial dealings",[3]

Laurie Berberich notes that jury instructions in capital sentencing cases require the jury to consider many factors in arriving at a death sentence verdict, a variation of complexity by virtue of both the subject matter and the detail of the jury instruction.[4]

Mark Findlay aptly observed that:

> "Due to the unique dimensions of each case and each trial process, it is illusory and not a little distracting to search for universal and constant indicators when trying to determine the meaning of complexity."[5]

---

[1] Valerie P. Hans, David H. Kaye, Judge B. Michael Dann, Erin J. Farley, and Stephanie Albertson, *Science in the Jury Box: Jurors' Views and Understanding of Mitochondrial DNA Evidence,* p. 34, Cornell Law School Research Paper No. 07-021. http://ssrn.com/abstract=1025582.

[2] Neil Vidmar, *The Performance of the American Civil Jury: An Emperical Perspective*, 40 Arizona L. Rev., 849.

[3] Mike Redmayne, *Theorizing Jury Reform*; in Antony Duff, et al, The Trial on Trial, Vol 2 (Hart, 2006).

[4] Laurie B. Berberich, Jury Instructions Regarding Deadlock in Capital Sentencing, 29 Hoftra L. Rev. 1301 (2001).

[5] Mark Findlay, *Juror Comprehension and Complexity Strategies to Enhance Understanding*, 41 Brit. J. Criminal (2001) 56, 58.

Findlay's view is shared by Heuer and Penrod who note that trial complexity is not a unitary construct and that complicated facts and legal issues and large quantities of information create complexity.[6]

The definition of complex as set forth above therefore is based on examples such as above, the treatment by courts in the U.S.A. of fraud cases such as the trials of Kenneth Lay and Jeffrey Skilling, Lord Conrad Black, and former Louisiana Governor Edwin O. Edwards, and information obtained from interviews conducted with judges of the England and Wales Crown Courts in Chapter 9 and a survey of American judges and lawyers in Chapter 8.

There are probably other situations or circumstances which could be defined as a complex trial, for the purposes of this work the foregoing definition is sufficiently inclusive.

The debate in England and Wales and the U.S.A. offers a timely opportunity to examine the modes of trial as presently practiced and to evaluate the changes proposed by the critics and reformers. The methods used by the U.S.A., Canada, England and Wales to provide trial by jury in complex criminal cases are scrutinized as are civil cases in the U.S.A., to the extent their jurisprudence and management converges with criminal cases.

---

[6] Larry Heuer and Steven Penrod, *Trial Complexity A Field Investigation of Its Meaniing and Its Effects*, 18 Law & Hum. Behavior 29 (1994) 48.

The comparison of the bench trial as an alternative to the jury trial, particularly in serious fraud cases, includes a study of outcomes in both modes of trial.

However, this study finds that both modes of trial have unique features that may impact both mode of trial choices and trial outcomes. Choice of mode of trial can, because of the nature of the case and the rules of evidence, impact the outcome. Mode of trial differences are examined to determine what impact those differences have on outcome depending on the subject matter of the trial.

A number of factors are potentially significant to the outcome of jury trials, i.e.: external and internal influences on jurors, the composition of the jury; rights juries may have to privacy and free speech; what effect post-trial speech exercised by jurors has on the deliberative process; notions of jury coercion both inside the jury by jury charge and other means; and the effectiveness of the longstanding Lord Mansfield's Rule in each comparator jurisdiction.

In America and England and Wales the complexity of jury trials may drive an increase in plea bargaining or settlement rather than trial. Inevitably the issue of jury competence to hear such complex cases is raised, coupled with management difficulties associated with a formal jury trial in a complex case, ranging from elaborate evidentiary organization with hundreds to thousands of exhibits, to the heavy reliance on forensic experts with the nuanced rules of evidence and likely a cacophony of objections which will make the complex jury trial a slow process. The actual subject matter of these cases is so highly

sophisticated and complex that concern about jury capacity to understand DNA, handwriting, accounting, pathology, voice pattern analysis, and actuaries is well documented.

This study will also evaluate the contention that England and Wales has moved slowly toward elements of a civil code jurisdiction by virtue of legislation and practice, elevating the judge only trial to a new level of significance. Examples of the trend are the abandonment of the jury in civil cases, the elimination of hearsay as a testimonial bar in civil cases and as a weighing factor in criminal cases, Diplock non-jury trials in Northern Ireland and the recent attempt to impose non-jury trial are all trends suggestive of greater reliance on the judge only concept. In Canada, there is a longstanding history of bench trials in civil and non-serious criminal cases. In America the role of the judge only trial has not been elevated in the same manner, particularly in a jurisdiction like New York State where the criminal defendant has control over the mode of trial.

Whether it is England and Wales with the emergent bench trial or the U.S.A. where the bench trial may be under utilized, the distinctions of that mode of trial from the jury trial impacts upon mode of trial decisions and evaluations of fairness and soundness. The bench trial is a mode of trial in which the trier of fact is one person randomly selected in all jurisdictions. There is a wide variance in judicial behaviour during the bench trial and the rules of evidence are frequently all but ignored. Some of the rules ignored include the practice that judges do not rule on objections in real time, there is no real limitation on

the standard and scope of judicial questioning, and appellate review is highly deferential to the trial judge when a bench verdict is reviewed.

This paper will look at the complex trial without a jury and consider whether such a mode of trial offers benefits that outweigh the obvious detriment – there is one trier of fact rather than twelve. It will examine the jury trial, exploring situations, circumstances and behaviours which some assert reflect flaws in jury capacity to understand complex cases.

What emerges are the conclusions that there is a failure on the part of the common law system to offer the bench trial as a viable alternative to the jury trial, that juries are sound triers of fact, and that both modes of trial, with proper calibration can offer defendants a fair adjudicatory framework.

There are two inevitable overriding concerns which must plague all fair policy makers. The two main concerns are: presently are the modes of trial comparable in each jurisdiction -- that is will the parties to the trial receive treatment in terms of the evidence and procedures which makes the modes of trial interchangeable options, and does having different processes to determine the same set of facts in a criminal case sound or fair especially when the defendant is not accorded the choice of mode of trial?

These concerns are evaluated in depth and the aforementioned conclusions are reached through the following process.

II. Research Questions

The question of mode of trial reliability exists in two parts: 1) is the jury trial a responsible and fair mechanism for deciding complex criminal and civil disputes and 2) is the bench trial a reliable or superior alternative. These are the overarching interrelated questions weighed in this study.

Closely related is the problem of mode of trial choices, that is who is to choose between the alternative modes of trial. A corollary question is what are the implications which are created for verdict integrity when the choice of the mode of trial is entirely made by a judge and not by the defendant.

The examination of these issues must commence with an analysis of the status quo in an attempt to determine the present state of the jury and bench trial in the comparator jurisdictions to evaluate if they are comparable processes and if there is confidence within the system about verdicts in both modes of trial.

One hypothesis is that comparing mode of trial conviction and acquittal rates in the U.S. Federal District Courts, California and New York helps to evaluate grossly the questions raised, as does examining other factors such as: the recent fate of corporations charged with crimes in New York State, jury as compared to bench trial selection in New York and California; patterns in New York State and California (factoring their similarities and differences) regarding both the choice of mode of trial; and selection of the trial judge. A survey of judges and New York State lawyers was conducted as an attempt to learn more

about the factors that go into mode of trial decision making, how the modes of trial compare in terms of evidence and procedure, and the analysis of those surveyed of verdict reliability. Interviews with nine English judges helped to evaluate the same processes as they are followed in England and Wales.

As noted above, the operating hypothesis which permeates this thesis commences with the belief that both modes of trial, if they are properly presided over with appropriate rules, achieve acceptable results. Further it is hypothesized that the market place should control which mode of trial is utilized rather than a unilateral process or a state imposed decision about the mode of trial. A further operating hypothesis is that the rules and procedures governing both modes of trial should be clearly identified and if each mode of trial does not parallel the other, the differences between the modes of trial should be readily apparent to the litigants so that informed choices can be made.

Thus, in an effort to determine if these theories are plausible, a survey was administered to New York State Trial judges and members of the American College of Trial Lawyers who practice in New York State which inquires about the factors considered in selecting a bench trial and how bench and jury trials are conducted in the opinion of the sample. It attempts to specifically determine:

a) How judges behave at bench trials.

b) What behaviours the lawyers believe are appropriate.

c) What is the application of the rules of evidence at bench trials presently?

d) What application of the rules of evidence would be favoured by lawyers?

e) Inquires about the present and preferred application of hearsay rule, the impact, if any, of the jurors with expertise, and attempts to measure judge/attorney agreement with jury verdicts and attorney agreement with bench verdicts.

At the same time, nine England and Wales judges were interviewed in an attempt to test the same hypothetical questions as asked of the judges and lawyers in New York.

III. **Research Methodology and Outline of Chapters**

The research questions posed above are in part addressed by a qualitative evaluation of judge as compared to jury trials and a quantitative survey and statistical comparisons of mode of trial choices in the New York State court system.

Much of the research for this paper has been the hard/soft law as set forth in cases, official government reports, newspaper accounts of trials, law journal and studies with the application of socio legal studies in an attempt to understand both judge and jury behaviour.[7]

There is no readily available compendium of complex trial outcomes, so there is reliance upon anecdotal reports of trial outcomes in complex cases in the U.S.A., England and Wales and Canada. They are not scientifically selected, rather they are considered

[7] D. Nelken (1981) *The Gap Problem in The Sociology of Law: A Theoretical Review,* 1 Windsor Yearbook of Access to Justice, 35-61.

because their notoriety or prominence unlike the survey of New York judges and lawyers.

Chapter 2 evaluates the jury trial in terms of external factors that might influence juries utilizing case law, law journal articles, and news reports. In Chapter 3, case law and law journal articles offer an analysis of jury coercion by judicial charge, as well as the effects of race and public opinion, with a primary emphasis on the U.S.A. but also evaluating England and Wales and Canada. In Chapter 3 the six interviews that were conducted with jurors in death penalty cases are reported on the narrow issue of confirming the juror's understanding of a judge's final charge in a capital case, and attempting to ascertain that jurors did not infer that there would some day be parole for the convicted defendant if they sentence the defendant to life without parole. The author was present for the interviews. Some interviews were primarily conducted by his students, others by the author.

Chapter 4 explores the American notion of unconstitutional complexity and outlines the debate about jury competence in complex cases in England and Wales and the U.S.A.

Chapter 5 reports the present law in the comparator jurisdictions regarding choice of mode of trial, evaluates proposals to modify mode of trial choices and reviews the present law regarding judicial disqualification, recusal and preemptive challenge.

In Chapter 6, a quantitative approach is used to compare a number of bench and jury trials in California and New York, a well as the rate of conviction and acquittal. Also a rudimentary comparison is used to examine mode of trial choices and outcomes regarding the trial of corporations as criminal defendants in New York State. This approach is utilized to evaluate the present use of mode of trial choices in those jurisdictions, to evaluate outcomes and to provide a statistical foundation to help identify more clearly what possible implications might be associated with the England and Wales government's proposed changes in serious fraud cases.

In Chapter 7, key evidentiary rules and how they are applied in jury and bench trials are detailed in the comparator jurisdictions based on statute and case law.

Chapter 8 reports a survey of New York State trial judges and lawyers on the main issues examined in this thesis including: what motivates mode of trial choices in a jurisdiction where the defendant is empowered to select the mode of trial; what factors impact on the mode of trial choice; what is the fairness of both modes of trial; what are the judicial behaviours in both modes of trial including pretrial; are there substantial differences in actual practice between judge only trials and jury trials; what is the judicial and attorney view of the reliability of verdicts in the jury trial; what is the attorney view of the reliability of bench verdicts; how are new factors such as jurors with expertise impacting outcomes? In Chapter 8 a quantitative analysis which includes a statistical comparison of survey results from New York State judges and selected New York State trial lawyers is presented. The survey inquires regarding the research questions attempting to ascertain

the level of confidence that exists in juries among the surveyed groups. It is important to emphasize that each survey was written by the author but edited/redrafted by Elissa Kraus and other staff of the New York State Office of Court Administration, which then provided a web link for the survey and statistically analyzed the data. The data calculations and analysis have been utilized by the author as a collaborative work product with full recognition and attribution being given to the Office of Court Administration, without whom the survey could not have been administered and who invaluably provided assistance and analysis of the outcome.

Likewise in Chapter 9, a qualitative study was used to interview nine English judges qualified to try serious fraud cases. The sample was selected both from an undisclosed year of the Serious Fraud Office Reports of trial and from names suggested by the judicial administration of England and Wales. The interviews were designed to gauge judicial opinions about jury reliability in complex cases, the comparative advantages and disadvantages presented by both modes of trial, the effectiveness of various managerial policies on the administration of complex cases, and the effect of changes in rules of evidence and jury selection.

The study again tests the research questions articulated above utilizing an interview process mandated as a condition for the interviews.

Chapter 10 will offer the author's conclusions and proposals for reform.

IV. **Importance of the Study**

The lack of academic attention to judicial opinions and conduct regarding mode of trial choice, the reasons therefore, pretrial and intra conduct, and the success/failure of managerial approach in England and Wales is striking. The study herein is of value in that it gives a small sample of serious fraud credentialed judges an opportunity to comment on proposals to diminish trial by jury and to evaluate changes such as managerial policies and evidentiary procedures.

While in the U.S.A there has been a broad based examination of judge/jury agreement, this study looks specifically at complex cases, not only in the terms of judge/jury agreement, but actual outcomes and practices in complex trials.

The thrust of this study is to compare and contrast jury trials as compared to bench trials with the conclusion that the right to a jury trial will be strengthened by improving bench trial practices, offering the defendant mode of trial choices, and permitting peremptory challenges of judges in bench trials.

Chapter 2

JURY RIGHTS, THE INTRADELIBERATIVE PRIVILEGE, AND A FAIR TRIAL – CAN THEY CO-EXIST?

I. Introduction

There is a world of difference between the simple rendering of a trial verdict by a jury and a sound jury verdict that resonates fairness and justice. Criminal jury trials have become major news events, consequently they are the common subject of analysis at all phases of the trial by experts and the press. A United States Supreme Court Justice has acknowledged that the modern trial is not just conducted in the courtroom, but also in the "court of public opinion".[8] Even "routine" murders, rapes and burglary trials in America, England and Wales and Canada receive substantial local publicity in community and regional newspapers and on the local television and radio news. At the center of this spectacle is the jury – citizens summoned by force of law, ordered to interrupt their lives to become as a group the triers of fact, the legally empowered mechanism of the law which decides guilt or innocence. The stakes are frequently high for both the government and the defendant. The subject matter often involves base and demoralizing facts.

Summoned into this high stakes battle between the government and the defendant, individual jurors traditionally are poked and prodded but not protected by the system they serve. It is only in the latter part of the twentieth century that the concept of a jurors' right to privacy has been introduced as a serious proposition -- primarily in America. A

---

[8] Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) per Justice Kennedy.

juror's right to privacy includes protection from public intervention into their private lives as a result of jury service and accords jurors enhanced protection from harm as a result of their public service.[9] The emergence of the notion of juror rights has set up a clash of conflicting interests between the jury, the parties, the media, and even the lawyers.

Who the jurors are, what they believe, and how they will respond to the evidence, composes much of the great unknown in any trial, whether in America, England, Wales or Canada. In recognition that the jury is a major unknown quantity in a trial, far more uncertain than the application of the rules of evidence, the quirks of the trial judge, or the skills of the lawyers, it is the American conventional legal wisdom that there is a tactical advantage associated with detailed knowledge of the composition of the venire summoned for jury selection. That tactical advantage accentuates a great divide between the American jury trial and jury trials in Canada and England and Wales. That perceived tactical advantage in America has fueled the emergence of jury research experts who are retained to reduce the uncertainty and unpredictability attendant with jury selection. Jury research fuels an even more intimate American approach to jurors' private lives, prompting invasive questioning of jurors in American courtrooms, personalizing each and every juror's voir dire to the maximum. Jury research customarily is performed by consultants, retained by trial lawyers, with a self proclaimed expertise in jury analysis. The jury consultants may be psychologists, or other behavioural science experts. It has

---

[9] David Weinstein, *Protecting a Jurors Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temple L. Rev. 1 (1997). Weinstein argues that jurors privacy rights emanate from a "second strain of privacy rights: the individual's interest in avoiding disclosure of personal matters" citing Whalen v. Roe, 429 U.S. 589 (1977).

become an established American litigation tool, utilized pretrial to study potential jurors by the creation of profiles of the ideal juror likely to vote for one side or the other. Jury research also commonly evaluates jurors during jury selection providing recommendations about which jurors should be selected or rejected. During the trial shadow juries are empanelled to mirror the background of the actual jury. The shadow jury unobtrusively sits through the entire trial in the spectator area providing ongoing feedback at the end of the day or during trial recesses to the client/trial lawyer regarding their reaction (and thus, presumably the reaction of the actual jury) to events in the courtroom. The objective is to orchestrate behaviour and proof in the courtroom in a way that will be favorably perceived by the actual jury.

The American remedy to increased invasiveness is to permit anonymous juries in limited situations where there is a perceived potential risk to jurors or the integrity of the trial process. Post trial interviews are a final component of jury research for several reasons, primarily to evaluate trial technique and to assist the losing side in an effort to undo the unfavorable verdict.[10] Jury research of this type is not allowed in England and Wales or Canada.

Both England and Wales and Canada have a far more controlled and arguably respectful approach to jurors. There is virtually no voir dire in England and Wales and the prevailing notion is that a proper jury is truly random, defined as the first twelve called.

Absolute random jury selection, in a time in which the composition of jury pool is changing, poses new potential risks to sound verdicts. As England becomes more

[10] Paul M. Lisnek, *The Hidden Jury* (2003) at 23-26.

racially and ethnically diverse, there is an increasing risk that jurors with prejudice will pollute the jury's deliberations without any meaningful mechanism for culling them out.[11]

The Canadian criminal justice system does permit voir dire in a limited and controlled setting. Canadian jurisprudence has evolved to the recognition of race as a relevant factor that should be explored to rule out prejudice. Canadian courts have become more permissive in allowing voir dire about racial prejudice, while still significantly limiting personal questions to prospective jurors.

America, England, Wales and Canada hold, with varying applications, that once a jury verdict is rendered, a high legal standard should prevent the trial judge or the Appellate Courts from looking behind the verdict and second guessing the jury.[12] The nations differ post-verdict on whether or not the juror's deliberative process and discussions can be disclosed publicly. England and Wales by statute made it illegal for jurors to be questioned about their deliberations and in Canada a juror can be charged with a criminal offense for disclosing intra-deliberative conduct.[13] In America by contrast jurors post-trial have inside the courthouse interviews, provide detailed accounts of their deliberations and even dream of book deals and other ways to financially exploit their

---

[11] Gillian Daly and Rosemary Pattenden, *Racial Bias and the English Criminal Trial Jury*, 64 Cambridge Law Journal 678 (2005): a call for the taping of jury deliberations as a check on juror racial bias causing a miscarriage of justice.

[12] Allan Manson, *Freedom of Press and Juries: The Law the Courts and the Charter,* Chap. 11 (Philip Anisman and Allen M. Linden, Eds. 1986).

[13] Manson, *Id.*

jury service.[14] As will be seen below, however, lawyers and parties are sometimes limited in the contact they can have with jurors post trial.

How is a fair trial affected by American factors like state-of-the-art jury research, the advent of jury rights, and the recent phenomena of post-trial jury celebrity which has increased juror propensity to discuss the intra-deliberative jury room process? As we assess the jury's function does the emphasis on protecting the jury's verdict with nearly impermeable rules deprive the justice system of an important evaluative tool that would assist the ongoing judicial effort to obtain verdicts that are safe, reliable, and are worthy of public confidence? Does the ascendance of twenty-four hour television news and hyper aggressive journalism give the modern jury and the rules that encase it sufficient space and latitude to preserve the integrity of the jury system? Does the rule protecting intrinsic intra-deliberative discussions provide the necessary confidentiality for open and honest deliberations debate? Without that confidentiality is the integrity of a trial by jury placed in serious jeopardy?

Does the England and Wales principle of randomness create a definitional unfairness to minorities? Is the English jury so sequestered post verdict that injustice in a jury decision cannot be rooted out? Is the Canadian approach the right blend or would its restrictiveness create injustice and chaos in culturally diverse America and unwelcome dissent in the ostensibly well ordered English and Wales system?

---

[14] On the Rita Cosby program, MSNBC (an investigative television news show), two jurors in the California State Court sexual abuse trial of Michael Jackson announced post trial that they were writing a book about the trial as they impeached their own verdict.

Finally do the new rules of jury composition adopted in much of America and now in England and Wales which eliminate automatic excusal from jury duty people with expertise (doctors, lawyers, judges, law professors, police officers) create an unacceptable risk that the jury will be offered expert opinions during deliberations by uniquely qualified fellow jurors who are not subject to the rigors of cross-examination or the rules of evidence?

This chapter will explore these questions, recognizing that there are no absolute answers, looking at the law of England and Wales, Canada, the American Federal law, as well as, the law of New York State and California. Rather like most of what occurs in courtrooms, there are situations which reoccur that require analysis and rules, which if fairly applied, would promote the likelihood of sound jury verdicts.

II. A Brief Comparative Analysis of Constitutional Rights, Jury Selection Rules, The Existence of Unanimous or Majority Verdicts, Remedies to Intra-Trial Juror Misconduct and the Judicial Powers to Set Aside Verdicts

America, England and Wales and Canada all strive to afford their citizens accused of a crime a fair adjudication of those charges. Comparing and contrasting laws, customs, and practices are helpful to determine whether the jury remains a sound device to decide factual disputes.

The relevant similarities and distinctions between the U.S.A., England and Canada regarding the right to trial by jury, the nature of jury selection, vote requirements for a guilty verdict, post-conviction verdict review by the trial judge, dismissal of jurors during the trial, and post-verdict proceedings offer a context regarding the jury's legal and cultural status in each jurisdiction

A. Constitutional Rights

The Canadian Charter of Rights and Freedom (Charter) 1982 recognized the right to jury trial:

> Any person charged with an offense has the right ... except in the case of an offense under military law tried before a military tribunal, to the benefit of a trial by jury where the maximum penalty for the offense is imprisonment for five years or a more severe punishment.[15]

According to leading legal authorities, there is no constitutional right to trial by jury in England and Wales.[16] However, there is the public perception that such a right is preserved by the constitution or the ECHR.[17] Indictable offenses are triable only by jury. Intermediate offenses may be triable by jury or magistrate at the option of the Defendant. Lesser offenses are tried generally by lay magistrates in groups of three, although sometimes magistrates may be trained lawyers.[18] Recent statutory developments would

---

[15] Can. Const. (Constitutional Act, 1982) (Pt. I, Canadian Charter of Rights and Freedoms), §11(f) [hereinafter Charter].

[16] Lord Justice Robin Auld, Review of the Criminal Courts in England and Wales, www.criminal-courts-review.org.uk. (Auld Report) (2001) ¶8 of Chapter 5; The European Convention on Human Rights (Article 6) does not specifically reserve the right to trial by jury; Alec Samuels, *Trials on Indictment Without a Jury*, 68 Journal of Criminal Law 125 (2004), and applies in many jurisdictions without juries.

[17] Lord Taylor, *Criminal Justice After the Royal Commission:* The Times, 28 July, 1993, commenting that there is "the perception of many that trial by jury is a fundamental right".

[18] Andrew Ashworth and Mike Redmayne, The Criminal Process (Third Edition, Oxford Press, 2005) 1, 2-8, 297-310. England and Wales divide offenses into three categories. Those triable on indictment only are the most serious. They are tried by jury in Crown Court. The defendant cannot opt to try by judge. Either way offenses may be tried in Crown court or Magistrates Court. The Defendant retains the absolute right to choose the mode of trial in either Crown Court

allow the prosecution to apply for a judicial order permitting a criminal indictment to be tried without a jury in a complicated fraud case if brought into force. Under the proposal, such an order may be granted on the condition that the length of time to complete the trial is likely to make the jury service burdensome to the jury, on the condition that the waiver of the jury trial is also approved by the Lord Chief Justice or his Judicial designee.[19] An order can only be granted after a preparatory hearing[20] in which the Court is satisfied that the issues can be simplified in a way that will not disadvantage the prosecution.[21] Finally the Court may under the proposal order a non-jury trial following the above format where there is the potential for jury tampering.[22] All of the foregoing will be examined in greater detail in Chapters 4, 5 and 9, including present pending legislation to enact a modified version of this statutory scheme.

The U.S.A. specifically preserves in the Sixth Amendment to the Constitution the right to a jury trial for any crime.[23] That requirement is made applicable to the States through the Fourteenth Amendment to the U.S. Constitution.[24]

---

or Magistrates Court. Magistrates are trained lay people who sit in a bench of more than one, advised by a clerk (lawyer). They hear the lower level crimes and offenses. Sometimes they are trained attorneys who are entitled stipendiary magistrates.

[19] Criminal Justice Act 2003, Part 7, 43 (4) (5).

[20] Id. Part 7, 45(6).

[21] Id. Part 7. 43 (6)(7).

[22] Id, Part 7, 46(3)(4)(5) once again a preparatory inquiry is required to determine if jury tampering has taken place and if to continue the trial without a "jury would be fair to the Defendant" and if the trial might be terminated in the interests of justice. If so a new trial without a jury may be ordered.

B. Jury Composition/Selection

The American Federal District Courts and State Courts accord the prosecution and the defendant peremptory challenges as well as the right to challenge for cause, which are challenges decided by a judge.[25] In New York State death penalty cases special voir dire is permitted of each juror one at a time regarding qualifications and racial bias.[26] Juries are summoned in many states and by the Federal Courts from voter rolls. New York State, California and several other states use drivers' licenses, social services lists, and other like sources to supplement the voter rolls. There are few exceptions from jury duty under the Federal system and in New York and California jurors are commonly voting age and above.[27]

---

[23] U.S. Const. Amend XI., The Sixth Amendment states " In all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."

[24] U.S. Const. XIV Section 1: The Fourteenth Amendment to the U.S. Constitution, Section 1 provides in pertinent part, "No state shall make or enforce any law which shall abridge the privileges and amenities of citizens of the U.S., or shall any State deprive any person of life, liberty, or property without due process of law..."

[25] U.S. Dept. of Justice, Bureau of Juror Statistics, State Court Organization, 1998, 273-276. In the U.S. District Court the preemptory challenges are twenty each for both sides in a capital case, six for state and ten for reference in a felony case. In New York State Court the prosecutor has twenty/fifteen/ten preemptory challenges depending on the seriousness of the felony, the Defendant has twenty/fifteen/ten preemptory challenges. In California State Court the prosecutor has twenty/ten preemptory challenges, the Defendant has twenty/ten preemptory challenges. U.S. Dept. of Justice, Bureau of Juror Statistics, State Court Organization, 1998, 273-276.

[26] New York Criminal Procedure Law §270.16. (McKinney 2005).

[27] U.S. Dept. of Justice, Bureau of Justice Statistics, State Court Organization 1998, 263-272.

In England and Wales, there are no peremptory challenges[28] and the exercise of challenges for cause is so limited that an experienced trial judge is quoted as stating that he has never seen a challenge for cause in all of his years on the bench.[29] The prosecution retains the right to stand aside jurors.[30] English juries are ages 18 to 70 with names obtained from the election rolls.[31] Previously there were a number of exceptions from English jury duty including hardship and specific occupations including barristers, solicitors, legal executives, police, prison and probation officers, clergymen, the mentally ill,[32] those with a criminal record who have received a specific type of sentence,[33] and those on bail.[34] The Criminal Justice Act of 2003 removed many of those exemptions from jury duty.[35] Jury selection in England and Wales is based on the notion of random selection: Juries are chosen at random so as to give a broad cross-section of society the opportunity to serve, but are not intended to be average or representative.[36]

---

[28] Criminal Justice Act, 1988, Ch. 33, §118 (1); *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England, and Canada,* 16 LOY. L.A. Int'l & Comp L. J. 201 1993-1994 at 217.

[29] James Morton, [1987] *Jury Selection,* 137 New Law Journal 561 citing a letter by Judge Alan King Hamilton to the Times.

[30] Sally Lloyd Bostock and Cheryl Thomas, *Decline of the Little Parliament, Juries and Jury Reform in England and Wales*, 62 Law & Contemp Probs. 7 (1999).

[31] Juries Act 1974.

[32] *Id.* Sch.1, Pt I.

[33] *Id.* Sch.1, Pt. II.

[34] Criminal Justice & Public Order Act, 1994, §40.

[35] Criminal Justice Act (2003) Section 321, Schedule 33, Jury Service §3. This Act repeals the prior Section 9(12) of the Juries Act 1974 (c. 23) which repealed most occupational excuses from jury service. The occupations no longer exempt include solicitors, barristers, police officers, and physicians. The mentally ill, those on bail and sentence remain excluded.

In Canada peremptory challenges are equally provided to both sides – twenty where the charge is high treason or first degree murder, twelve where the charge is any other offense which carries a term of more than five years, and four where the defendant is charged with any other offense.[37]

While the selection of jurors in Canada falls within the jurisdiction of both the State and Federal governments,[38] the Constitution Act, 1867 (The British North America Act of the Westminster Parliament) gave [the Ottawa] Parliament jurisdiction over jury selection within the courtroom and the provincial legislatures over the circumstances and conditions of jury panels.[39] Most provincial jury acts make all citizens eligible for jury duty with exemptions for public officials, lawyers, teachers, clergy, police officers, physicians, nurses, and pharmacists.[40]

The jury is assembled in the sole discretion of the Sheriffs in some provinces, in other provinces they are assembled by a judge who likewise has sole discretion. In yet other provinces jurors are drawn from specified lists.[41]

---

[36] Peter Ferguson, *Whistleblowing Jurors* [2004], 154 New Law Journal 370; R. v. Smith (2003) 1 W.L.R. 2229.

[37] Criminal Code (Jury), 40-41 Eliz II, Ch. 41 §§634, 641.

[38] R. v. Sherratt [1991] 1. S.C.R. 509 at 519-20 and R. v. Burro [1987] 2 S.C.R. 694 at 712-13.

[39] Section 91(27) and Section 92(14).

[40] David M. Tanovich, David M. Paciocco & Steven Skurka, [1997] *Jury Selection in Criminal Trials: Skills, Science, and the Law* (1997) pg. 273.

[41] *Id.*, 56.

In Canada there are two challenges; the challenge for cause which can result in a mini trial, and a challenge to the panel (to the array) based on three grounds -- partiality, fraud, or wilfull misconduct on the part of the summoning party.[42]

To further explain the challenge to the panel, under the common law before 1993, the judge could excuse or stand-by jurors only with the consent of lawyers for the prosecution and the defendant. In 1993, the Code was amended to allow the trial judge to excuse jurors at any time before the trial for the following reasons:

1) Personal interest in the matter to be tried;

2) A relationship personal in nature with the judge, attorneys, accused or a likely witness;

3) Personal hardship.

The judge did have the authority to require jurors called by the clerk to stand aside, however this power was declared unconstitutional.[43]

The framework for a challenge for cause is established by statute, the grounds being:

a. The name of the juror does not appear on the panel.[44]

b. A juror is not indifferent between the Queen and the accused.

---

[42] Crim. Code 629(1); R. v. Hayes (No.2) (1903) 9 C.C.C. 101 (B.C.S.C.) Re Thomas and The Queen (1973) 12 C.C.C. (2d) 78, 23 CRNS41 (ONT. H.C.J.); R. v. Brass [1981] 4 W.W.R. 657 (B.C.S.C.)

[43] Crim. Code 633; R. v. Williams (1998) 1 S.C.R. 1128, 124 C.C.C.3d 481.

[44] This is the sole challenge for cause issue decided by the Judge. Crim. Code 640(1); Tanovich et al, *supra,* 89.

c. A prior conviction carrying a sentence of death or incarceration greater than twelve months.

d. The juror is an alien.

e. The juror is physically unable to perform.

f. Language problems.[45]

A challenge for cause to an individual juror based on the issue of indifference which is found by the judge to have an air of reality results in a process that can take the form of a brief trial on the validity of the challenge – to be decided by triers – two jurors sworn to determine if the ground of the challenge for cause is true.[46] The trial judge prior to the commencement of the selection process may determine who is not indifferent to the parties because of obvious partiality, notwithstanding that the code is silent on the matter.[47]

A lawyer asserts the challenge for cause in writing (unless the challenge will not embarrass the juror) and is made just prior to the juror taking the oath outside of the presence of the rest of the panel.[48] The challenge must have at minimum an air of reality, the standard defined as there is a realistic potential for the existence of juror partiality.[49]

---

[45] Crim. Code 638(l).

[46] Crim. Code 638(1)9b)-(f).

[47] E.G. Ewaschuk, *Criminal Pleadings and Practice In Canada*, 2nd Ed., pg. 17-6.

[48] *Id.* 17-5.

[49] R. v. Hubbert (1975) 29 C.C.C.92d) 279, 31 C.RN.S. 27, 110.R.(2d) 464 (C.A.); affd [1977] 2 S.C.R. 267, 38 C.R.N.S. 381, 33 C.C.C. (2d) 207 (Note), 15 O.R.2d 324; R. v. Sherratt [1991] 1 S.C.R. 509, 3 C.R.129, 63 C.C.C.(3d) 193.

Pursuant to the Criminal Code, the judge retains the threshold power to determine if the challenge meets minimum standards sufficient to allow it to proceed.[50] The trial court exercises discretion. Appellate review of such a decision is based on whether or not it was a proper exercise of discretion and not whether or not the appellate court agrees with the decision.[51]

If the judge determines that the threshold is met, then written questions are submitted to the judge that the attorneys would propose to ask of the challenged prospective juror before two triers. The judge may also ask preliminary questions to determine if the juror is indifferent.[52]

Setting forth a procedure that has a historical foundation but is virtually unique in modern times,[53] the statute requires that the decision be made by triers as follows:

> "The two jurors who were last sworn, and if no jurors have then been sworn, two persons present whom the Court may appoint for the purpose, shall be sworn to determine whether the ground of the challenge is true."[54]

---

[50] Crim. Code 639(1), 638.

[51] John Granger, *The Criminal Jury Trial in Canada*, 2nd Ed. (Carswell, 1996) pg. 165.

[52] Tanovich, et al., *supra,* note 40, at 147.

[53] R. Blake Brown, *Challenges for Cause, Stand Asides, and Peremptory Challenges in the Nineteenth Century,* 38 Osgoode Hall Law J. 453. This article traces the role of triers to decide challenges for cause as they were used in the 18th and 19th centuries. Both New York and Massachusetts stopped using triers and permitted the Court to decide these challenges by the end of the 19th century, 476-477.

[54] Crim. Code 638(1)(b) to (f); Ewaschuk, *supra*, note 17, at 175.

The two triers must decide the challenge unanimously.[55] If there is another challenge, the last seated juror replaces one of the two triers and sits in judgment on the next challenge.[56] If the triers cannot agree, then they are replaced and two other triers are sworn.[57]

In this proceeding the judge charges the triers that the burden of proof is on the challenger and that the decision of the triers must be based on a balance of the probabilities.[58] The judge further charges that by that standard they must determine if the juror's indifferent – that is impartial as between the Crown and the accused.[59] This process is repeated with each challenge.[60]

C. Unanimous or Majority Vote – The Requirement for a Guilty Verdict

But for two states, all other U.S.A. jurisdictions require a unanimous verdict.[61] This custom is pursuant to common law in the Federal courts.[62] Canada requires unanimous

---

[55] Tanovich, *supra* note *40,* at 167.

[56] Neil Vidmar, *The Canadian Criminal Jury System: Searching for a Middle Ground*, 62 Law & Contemp. Probs. 141, 144-145, (1999).

[57] 640(4) of the Criminal Code.
[58] R. v. Hubbert, *supra* note 49..
[59]Tanovich, et al, *supra* note 40 at 166.
[60]Granger, *supra* note 51, at 188.
[61] U.S. Dept. of Justice Statistics, Bureau of Justice Statistics, State Court Organization (1998) pg. 278-281. There are two American jurisdictions that are exceptions to the rule. They are Louisiana 10/12 unless capital or may be confined to hard labor and Oregon 5/6 of 12 except in murder where the verdict must be unanimous.
[62] Patton v. United States, 281 U.S. 276, 50 S.Ct. 253 (1930) - there were three elements to trial by jury when the U.S. Constitution was adopted, (1) the jury should consist of 12 men, (2) the trial should be in the presence of a Judge who decides the law, (3) the verdict should be unanimous.

verdicts.[63] England and Wales have a discretionary time limit variation for majority verdicts that makes the English system different from the States of Louisiana and Oregon, who also do not require unanimous verdicts.[64] In England and Wales, the court in its discretion, after jury deliberations exceed two hours, may allow a majority verdict, requiring a vote of ten jurors when the jury is composed of eleven or twelve jurors. The majority must be at least nine when the jury has been reduced to ten.[65]

Some commentators have opined that England and Wales opted for majority verdicts to achieve greater efficiency and more convictions in their criminal justice system.[66] However the Crown Prosecution Service reports that even with majority verdicts, forty percent of the Crown Court cases tried to a jury result in acquittal.[67] In America the acquittal rate by a jury in Federal District Court is 17 percent, and "The national hung jury rate in a criminal case is about 2.5 percent in the Federal Courts and five percent in the State Courts according to one survey".[68]

---

[63] R v. Pan, (1999) 134 C.C.C. (3d) 1 (para 98) gives the common law history of the unanimous verdict in England and Canada.

[64] Likewise in the U.S. the 6th Amendment to the U.S. Constitution does not require an unanimous verdict but the common law of all states and any statutes adopted on the topic do require an unanimous verdict in criminal cases, see note 20, U.S. Dept of Justice.

[65] England and Wales departed from the Common Law tradition in 1967 with the adoption of the Criminal Justice Act, 1967, §13, now Juries Act, 1974, §17.

[66] A. Saunders and R. Young, Criminal Justice (Butterworths, 1994) p. 361-364.

[67] Statistical Service, Home Office Statistical Bulletin, Issue 16196, Supp. TBL. (1996) page 4.

[68] Federal Justice Statistics Data Base (2003); Michael J. Saks, *What do Jury Experiments Tell Us About Jury Decisions*. 6 Southern California Interdisciplinary Law Journal 1, 40 (1997); Kenneth S. Klein and Theodore D. Klastorin , *Do Diverse Juries Aid or Impede Justice?* 1999 Wisconsin Law Review 553, 562, (1999) N. 53; Paula L. Hannaford, Valerie P. Hans and G. Thomas Munsterman, *How Much Justice Hangs in the Balance*, 83 Judicature 59 (1999).

D. Post-Conviction Judicial Power to Set Aside A Jury Verdict

A Canadian trial judge can set aside inconsistent verdicts,[69] but may not aside a verdict on the grounds that it is unreasonable or that it cannot be supported by the evidence. A jury verdict may be set aside on appeal where it is found that the verdict is unreasonable or not be supported by the evidence. The Crown may not appeal an acquittal.[70]

New York and California offer a mechanism wherein the trial judge may only set aside a conviction, not an acquittal. A federal court can set aside a conviction but not an acquittal.[71]

England and Wales do not accord the trial court the ability to set aside a perverse verdict.[72]

E. Intra Trial Juror Dismissal By Trial Judge Or Misconduct Or Other Non-Health Reasons

Jury trials provoke circumstances wherein juror conduct, or intervening circumstances, or events can raise questions regarding the impartiality of jurors during trial.

---

[69] R. v. Sweetland (1957) 42 Cr.App.R. 62 (C.C.A.)

[70] Canada Criminal Code §686 1(a)(i); R. v. Yerbes (1987) 2 S.C.R. 168; R. v. Riniaris [2000] 1 S.C.R. 381, 2000 S.C.C. 15; R. v. Molodowic [2000] 1 S.C.R. 420, 2000 S.C.C. 16; R. v. A.G. [2000] 1 S.C.R. 439; 2000 S.C.C. 17.

[71] New York Criminal Procedure Law 290.10, McKinney's Vol., 11A, (2005) Trial Order of Dismissal allowed after jury verdict if the evidence is not legally sufficient to support a verdict and 440.30 Motion to Vacate Judgment and to set aside verdict. Given a showing the Court may order a hearing that may include juror testimony where misconduct is alleged. California Evid Code §1150; Penal Code §1181. Court is allowed to accept Affidavits or to hold a hearing where indicated in its discretion.

[72] Auld Report, *supra*, note 16, at Chap.5, ¶99-108.

The English standard for the discharge of a jury before a verdict is reached is based on the trial judge becoming "so minded to (discharge the jury) because jury tampering appears to have taken place"[73] While the statute requires the Court to place both sides on notice and to allow representations, [74] it does not authorize an American style proceeding in which the juror or jurors are questioned by the judge. [75] The judge can continue the trial without a jury if he is satisfied that jury tampering has occurred and that to continue would be fair to the defendants, but must terminate the trial if he considers it to be in the interest of justice.[76] In that event the judge may order the re-trial to occur without a jury.[77]

In R v. Smith and R. v. Mercea,[78] the Law Lords confirmed that it would be inappropriate for the Court to question jurors while deliberations were ongoing about allegations made by one of the jurors that the jury was violating the Court's instruction, unlike the U.S.A. (as we will see below) where the judge can pre-deliberation, intra-deliberation, or post-deliberation question jurors regarding potential misconduct. However, the European Court of Human Rights in Sander v. U.K. made it clear that while the judge may not inquire of the jurors, the judge must discharge the jury where the objective indication is one of prejudice.[79] One commentator took issue with this decision acknowledging that

---

[73] Criminal Justice Act, 2003, Part 7, 4[1](a)(b).
[74] *Id.* Part 7, 46(2).
[75] In Gregory v. United Kingdom, (1998) 25 E.H.R.R. 577, the European Court at 593-594 said "It was also accepted by both the applicant and the government that it was not possible under English law for the trial judge to question the circumstances which gave rise to the note."
[76] Criminal Justice Act 2003, Part 7, 46(3)(4).
[77] *Id.* Part 7, 46(5).
[78] R. v. Smith and R. v. Mercea [2005] UKHL 12.
[79] Sander v. United Kingdom (2001) 32 E.H.R.R. 44. The Court opined that the trial judge 's further instruction advising against prejudice was inadequate and the jury should have been discharged wherein twelve jurors in one note denied possible racial bias, but one of the jurors by

prejudice exists "But the process of deliberation in the jury room tends to neutralize prejudices" and arguing that majority verdicts also protect against prejudice.[80]

The trial judge has far more flexibility in both Canadian and American Courts. The Canada Criminal Code allows the trial judge to hold a hearing (with the judge primarily questioning, sometimes the juror is sworn and cross-examination is sometimes allowed) when a question of improper external influences or other forms of misconduct or violation of the jurors oath are credibly raised. The Court may discharge the juror where the circumstances warrant.[81]

The U.S. Federal Rule of Evidence §606(b) is applicable only to post-verdict inquiries. During a trial, Federal judges are empowered by common law to offset prejudice upon a showing of possible misconduct, and may inquire as to jurors' thought processes to the extent that this misconduct may have influenced the juror.[82]

---

a separate note apologized for telling racist jokes. However in R. v. Orgles the Court of Appeal Criminal Division reversed a guilty verdict because the recorder had questioned two jurors separate from the rest of the jury about their reports of jury dishonesty, and rather called for the entire jury to be questioned through the foreman in open court to determine if whether as a body it anticipates bringing a true verdict. The Court appears to rely on the notion that dissension is a internal matter, but extrinsic contact would permit individual questioning of jurors to determine if they had been infected questioning the juror separately to avoid infecting the others jurors, thereby allowing the Court to dismiss up to three jurors if so required under 516 of The Juries Act (1974). R. v. Orgles [1993] 143 New Law Journal 886.

[80] Michael Zander [2002] *The Complaining Juror,* 150 New Law Journal, p. 723.

[81] Canadian Criminal Code §644; R. v. Sophonow (No.2) 1986 25 C.C.C.3d 4-15 (MAN C.A.); R. v. Hahn (1995) 62 B.C.A.C. 6; R. v. Taillefer (1995) 100 C.C.C. (3d) 1 (Que. C.A.); R. v. Lessard (1992) 74 C.C.C.3d 552 (QUE. C.A.) R. v. Musitano, et al. (1985), 23 C.C.C. (3d) 65, 25 D.L.R. (4th) 299 (ONT. C.A.).

[82] United States v. Rowe, 906 F.2d 654, 656 N. 3 (11th Cir. 1990); United States v. Richards, 241 F.3d 335, 343-344 (3rd Cir. 2001).

In California and New York there are statutory procedures which allow the Court to discharge a juror before the verdict following a hearing or showing.[83]

In American Courts (Federal and State) the most common method utilized for dealing with reports of juror misconduct or potentially prejudicial occurrences is to question the juror/jurors in camera with counsel and the defendant present, engaging in what one court referred to as a "probing and tactful inquiry".[84]

Both New York and California authorize such a procedure. Considering New York first, the state statutory law provides that:

> "If... the Court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature but not warranting the declaration of a mistrial, the Court must discharge such juror".[85]

The application of the statute is not without problems. For example, a juror told a court officer during jury deliberations that she did not understand what was going on. While this report was being discussed by the judge with the attorneys, the jury sent out a note indicating they had reached a verdict.[86] The court took the verdict and then interviewed

---

[83] New York Judiciary Law §510, New York Criminal Procedure Law 270.35; Under New York law a juror must be able to understand English; The further standard is that a juror not be grossly unqualified or engage in substantial misconduct. California Penal Code 1120, 1150, 1089 provides that juror disqualification is based on misconduct, lack of knowledge of English and inability to perform functions.

[84] People v. Buford, 69 N.Y.2d 290 at 299 (1982). Two cases decided at the same time by the Court of Appeals. In one a trial jury saw two witnesses leaving court with a juror and inquired about that. After questioning the juror who assured the trial court that she understood that this was inappropriate and that the matter was not significant, the juror was dismissed and the trial continued with an alternate juror. The court reversed the conviction finding this to be an abuse of discretion.

[85] Criminal Procedure Law §270.351, McKinney's Vol 7A, page 389. (2005).

[86] People v. Sanchez, 99 N.Y.2d 622, 790 N.E.2d 766, 760 N.Y.S.2d 391 (2003).

the juror "to determine whether she was grossly unqualified" under C.P.L. 270.35. The court held that the juror was qualified and upheld the verdict. On appellate review it was held that the court's inquiry was both misdirected and incomplete, falling short of the "probing and tactful inquiry" that a court must undertake when it appears that a juror may be grossly unqualified".[87] The Court of Appeals reasoned that the trial court only asked the juror about her age, address, citizenship and if she was ever charged with a crime along with a single question as to whether she was able to understand and communicate in English. Based on the standard established by Judiciary Law §510 [88] the court ruled that she was qualified to serve as a juror despite failing to ask her what she meant by her "extraordinary statements to the court officer".[89] The New York Court of Appeals reversed and ordered a new trial because the court's inquiry was inadequate but cautioned that it would have been "unnecessary and indeed inappropriate to subject the juror to questions relating to her thought processes (about) the deliberations or other matters that lie within the confines of the jury room".[90] On further review the actual transcript does indicate that the juror answered questions both during the jury selection and the post-verdict proceeding when the judge questioned the juror, that she properly answered when and where to questions about her conversation with the court officer and how that sequenced with deliberations. The transcript also demonstrates that she deliberated with the other jurors, and did ask fellow jurors to explain to her aspects of the case. There does not appear to be any sound reason to set aside this verdict apart from the casual

---

[87] *See* People v. Buford, 69 N.Y.2d 290, 299 (Ct. App. 1987)

[88] Judiciary §510 (McKinneys) Qualifications for a New York juror are simply being a citizen over the age of 18, able to speak and understand English.

[89] People v. Sanchez, *supra*, note 86 at 293.

[90] *Id.*, Record on Appeal, R. 623-624.

statement made by the juror – and the transcript actually reflects a sufficient understanding of English to allow the juror to properly answer several judicially posed questions.[91]

In another case equally as vexing, the Appellate Court ruled that the trial court improperly discharged a juror who expressed concern about the racial composition of the jury during the prosecution's case. After reviewing the trial court's inquiry, the Appellate court concluded no information was elicited that would have demonstrated that the juror was "grossly unqualified" and set aside the verdict.[92]

California courts hold that once the judge is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it must make a reasonable factual inquiry into that possibility. The decision to investigate the possibility of juror bias, incompetence, or misconduct, like the ultimate decision to retain or discharge a juror, rests within the sound discretion of the trial court. A hearing is required only when the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and would justify his removal from the case.[93] California courts, like their counterparts in New York, appear far more inclined to probe the deliberative process than England and Wales or Canada. For example, the California Supreme Court has held that the statute requires the court to probe if a juror appeared to have personal knowledge of a fact and did not disclose the same, reversing a conviction based upon said failure.[94]

---

[91] *Id*, Record on Appeal, R. 1256-1257.
[92] People v. Anderson, 70 N.Y.2d 729 [1987].
[93] Cal. Penal Code 1120, 1150, 1089. (2005).
[94] People v. McNeal, 90 Cal. App.3d 830, 153 Cal.Rptr. 206 (1979) Ct; of Appeals 1st District.

F. Post Trial Jury Speech Regarding the Verdict

The Federal Rules of Criminal Procedure, as well as the laws of New York and California allow juror speech about jury room deliberations upon discharge from service. Canada does not allow post trial juror speech, making it an offense for a juror "to disclose any information relating to the proceedings of the jury when it was absent from the Courtroom".[95] England and Wales likewise prohibit juror speech, making it a crime to: "disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings".[96] The rule is applicable to both in-court or outside of court statements.

The basis for this rule is summarized as follows:

> "If one juryman might communicate with the public upon the evidence and the verdict, so might his colleagues also, and if they all took this dangerous course, differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts".[97]

This rule is also reflected in statute.[98]

---

[95] Canadian Criminal Code §649 found constitutional in R. v. Pan, [1999] 134 C.C.C. (3d) 1 (Ont. C.A.).

[96] Section 8(1) of the Contempt of Court Act, 1981 ("Confidentiality of Jury Deliberations"); the word disclose was defined in Attorney General V. Associated Newspapers 1994 2 AC 238 as including juror disclosure to third-party who then passed the details on to the newspapers – thus obtaining information from a juror, juror disclosing information and soliciting juror comment all are within the definition of disclose.

[97] R. v. Armstrong [1992] All E.R. 153 (CA) at pg. 157 per Lord Hewart C.J., cited in R. v. Pan, 2 S.C.R. 344, aff. 134 C.C.C. (3d) 1..

[98] §8 of the Contempt of Court Act 1981, Criminal Code §139(2).

It is helpful to review the longstanding common law that provides the foundation for the statutory and common law that protects the intradeliberative process of juries.

III. Does The Ghost of Lord Mansfield Impede Present Day Justice?

A. Jury Behaviour and Confusion – The Rule Meets the Modern Juror

Since 1785, the common law has held that the details of the jury's deliberations must be secret both during the trial and after the verdict is rendered. The seminal decision by Lord Mansfield held that the trial court could not overturn a verdict based on several jurors' affidavits despite the disclosure that they reached their decision by casting lots. Lord Mansfield reasoned that the jury's internal deliberations were secret and could not post-verdict be impeached even by the jurors themselves.[99] This principle continues to be followed over two centuries later in England and Wales,[100] the U.S.A.,[101] and Canada,[102]

---

[99] Vaise v. Delaval (1785) 1 T.R. 11, 99 E.R. 944 (K.B.) 1 Durn E II; also Wigmore on Evidence (McNaughton Rev. 1961) Vol.8 §2352 at p. 696. March 18, 2005.

[100] Jessica Holroyd, *Judging the Jury*, March 18, 2005, New Law Journal, who reasons that S8 contempt of Court Act 1981 prevents jurors from speaking out post-verdict and third parties to question jurors and the Common Law Rule prevents the Courts from inquiring into jury deliberations citing R v. Mirza.

[101] As will be seen below, America has been a less doctrinaire applicant of the rule. See J. Wigmore, 8 Evidence in Trials at Common Law, Para. 2352 (McNaughton Rv. 1961); Jorgensen v. York, Inc. Machinery Corp, 160 F.2d 432 (2d Cir. 1947). Both Wigmore and Judge Learned Hand regard Lord Mansfield's rule as having no basis in policy or precedent as an evidentiary rule.

[102] Philip Anisman and Allen Linden, *The Media, The Courts, and the Charter* (1986 Carswell) at 366, Regardless of the functional relationship between impeachability and secrecy at Common law, legislative changes in England and in Canada have asserted a need for secrecy in jury deliberations. In 1969 in response to one incident in Quebec the Commission recommended that "jurors should be prohibited from discussing what went on in the jury room in the course of the trial." Subsequently in 1972 Section 576.2 of the Code was passed by Parliament which states in part:

> "Every member of a jury who... disclosed any information Relating to the proceeding of the jury when it was absent from the Courtroom that was not subsequently disclosed in open court is guilty of an offense punishable on summary conviction."

creating a longstanding intradeliberative privilege (the Rule). However, each jurisdiction has a distinct application of the rule.

It is unlikely that Lord Mansfield could have foreseen the many changes in society over three centuries that pose significant challenges for the contemporary jury. During the Eighteenth Century, seventy-five percent of the population was excluded from juries. In fact there were even special juries composed only of the highest class of citizens in selected instances.[103] The rule is presently applied to a diverse society monitored by a gargantuan media machine that makes jury trials a major focus of daily news and culture. England and Wales have a virtually absolute rule "that the Court will never admit evidence from jurymen of the discussion which they may have had between themselves when considering their verdict or the reasons for their decision, whether the discussion took place in the jury room after retirement or in the jury box itself."[104]

In both Canada[105], and England and Wales,[106] the Court is not able to reach into the intrinsic deliberations of the jury at any time. The posture of both nations has provoked remarkably similar judicial dissents calling for a change in the rule in both countries and

---

[103] Douglas Hay, *The Class Composition of the Palladium of Liberty, in "Twelve Good Men and True: The Criminal Trial Jury in England*, 1200-1800 ed. Is. Cockburn and Thomas A. Green (Princeton, N.J.; Princeton University Press, 1998; James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross Section Requirement, and Peremptory Challenges,* William and Mary Bill of Rights Journal 623 (1998) and James Oldham, *The Origins of the Special Jury*, 50 University of Chicago Law Review 137 (1983).

[104] Ellis v. Deheer [1922] 2 K.B. 113, Bankes L.J. at 117-118. *See also*, R.v. Andrew Brown (1907) 7 N.S.W.S.R. 290.

[105] Christopher Granger, *The Criminal Jury Trial in Canada*, 2nd Ed. 1996, "A jurors evidence will not be accepted to impeach a verdict. Hence, a jury could base its verdict on inappropriate considerations r could arrive at its decision by flipping a coin and the verdict would remain unassailable. Likewise, a verdict cannot be impeached because the jury misunderstood the Judge's directions or ignored important evidence". Pg. 332.

[106] Contempt of Court Act, 1981, §8(2); R. v. Miah [1977] 2 CR. App. R. 12; R. v. Qureshi [2002] 1 CR. App.R. 433 [2002] 1 W.L.R. 518.

specific criticism of the rule in England and Wales by the Auld Report as we will see below. Nevertheless, the spirit of Lord Mansfield's Rule remains alive and well, a conclusion supported by a recent consultation paper which recommends a continued application of the rule in its present form which includes prohibiting even monitored, structured academic jury research.[107]

The U.S. Federal Courts, New York State, California, England and Wales and Canada presently appear to share relatively narrow and defined standards for the challenge of jury verdicts using juror testimony or affidavits, limiting any such proceeding to misconduct based on extrinsic factors which affected the verdict.

The American application of the rule is reflected in Rule 606(b) of the Federal Rules of Evidence:

> "A juror may not testify as to any matter or statement occurring during the course of the jury's deliberation or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror."

The common law adopts the rule as well.[108]

---

[107] Jury Research and Impropriety CP04/05. The paper does propose amending the statute to allow limited research into a jury's deliberations as permitted by the Secretary of State and the Lord Chief Justice under a code of conduct that would preserve anonymity of the parties. The paper embraces the status quo – that is the preservation of §8 of the Contempt of Court Act (1981) and Lord Mansfield's Rule.

[108] Rake v. U.S., 169 F.2d. 739, 4th Circuit 1948; cert denied 335 U.S. 826 (1948).

Even though Rule 606(b) is reflective of many American state statutes, it is instructive to review the applications of these same general concepts in New York and California as compared to Canada and England and Wales. In New York the standard is established by the common law. Generally a jury verdict may not be impeached by proof of the tenor of its deliberations, but only upon a showing of improper external influence. Improper influence is not simply a corrupt attempt to influence the jury, as even a well intentioned jury conduct which puts the jury into possession of evidence not introduced at trial.[109]

Although New York Courts utilize a standard comparable to the Federal Standard cited above, they have been far more flexible and have overturned verdicts, or ordered hearings into the verdicts rendered by juries in a number of instances such as the case in which the jurors learned by newspaper account of a co-defendants plea prior to trial,[110] or the case in which a juror utilized her own car on her own time during the trial to test a witness's testimony regarding sight distance in a comparable circumstance to the testimony and then reported her findings to the jury.[111]

The California standard, established by statute as well as common law, provides that a jury's mental processes may not be examined in evaluating the validity of a verdict.[112] The jury's mental processes are beyond the oversight of a probing court, but acts,

---

[109] People v. Brown, 48 N.Y.2d 388 (1979). A juror utilizing her own car, on her own time, during the trial performed a "test" to see if a witness's testimony regarding sight distance was accurate. The Court reversed the conviction based upon a hearing post-verdict in which the juror acknowledged this test and that it was part of the jury deliberations.

[110] People v. Testa, 94 A.D.2d 852; reversed and remanded, 61 N.Y.2d 1009, 43 N.E.2d 1223 (1984) the Court of Appeals held that the trial Court did not abuse its discretion regarding the soundness of the verdict given that it heard "conflicting testimony as to what transpired during deliberations...and whether this information had a substantial impact on the eventual verdict", 1009.

[111] People v. Brown, 48 N.Y.2d 388 (1979)

[112] Cal. Evid Code §1150.

objectively ascertainable, may be admissible but not a subjective reasoning process which can neither be corroborated nor disproved.[113]

Moreover, as noted earlier, the American practice is to allow jurors to comment on their verdict and give public interviews post-verdict. This practice raises significant issues about the rule and how it affects integrity of jury deliberations. In part the right to a fair jury trial must be weighed against freedom of speech and freedom of the press. We will first examine some common scenarios and decisions that jury behavior and problems have spawned.

1. Alcohol, Drugs, and Sleeping – The Inattentive Juror

The U.S. Supreme Court in Tanner v. U.S.[114] took a very restrictive view of Federal Rule of Evidence 606(b) holding that the post-trial testimony of a juror was admissible only where there was a prima facie showing of "extraneous influence". The Court embraced the principle that it is inappropriate and inadmissible in an application to set aside a verdict to show the actual impact of the tainting influence on the actual jury. Rather the proper showing is that the influence would adversely impact upon a normal juror or jury, an apparent attempt to preserve the secrecy of the actual deliberation. Despite proof from certain of the Tanner jurors who acknowledged significant use of alcohol at lunch and other times during the trial by the jury, the Court concluded that a hearing was not indicated as the affidavits alleging these activities did not raise external influences, but rather explored "the internal processes of the jury" – an exploration the Court declined to

[113] People v. Hutchinson (1969) 71 Cal.2d 342, 78 Cal. Rptr. 196, 455 P.2d 132; People v. Dancks (2004) 32 Cal.4th 269, 82 P2d 1249.
[114] 483 U.S. 107 (1987); FRE 606(b).

embark upon.[115] By contrast the California standard requires the trial court to conduct a hearing given a similar complaint.[116] The California Supreme Court held that the trial Court erred in not holding a hearing based on other jurors reports of a juror being intoxicated and smelling of marijuana during the first two days of deliberations and thus the Court reversed the conviction and ordered a new trial.

Sleeping during a trial is a ground for discharge,[117] and the trial judge could rely on his own observations and not hold a hearing on the issue.[118]

2. Racist Comments, the Jury Oath, and Jury Deliberations

Racist comments by jurors during all aspects of the trial including deliberations pose problems for all three nations. In America such comments have provoked a number of hearings either during the trial or post trial, despite broad based, liberal voir dire..

In a post-trial hearing on a motion to set aside the guilty verdict, a former juror testified that he heard another juror comment during selection "I know that N____R is guilty"; the Court ordered a hearing to inquire into whether or not the juror lied during voir dire about race or prejudice. The Court concluded that the jury member harbored an undisclosed preexisting opinion of guilt against the Defendant based upon his bias warranting reversal

[115] U.S. v. Tanner, *supra* note 114, at 120.
[116] People v. Burgener, 41 Cal. 3d 505, 224 Cal. Rptr 112 (1986), overruled on other grounds in People v. Reyes 19 Cal.4th 743 (1998) , cited in People v. Cleveland 25 Cal.4th 466 (2001).
[117] People v. Rogers (2 Dept, 1999) 266 A.D.2d 481; People v. LaTorres, 186 A.D.2d 479 (1st Dept., 1982), *Lv. denied* 81 N.Y.2d 842 (1993); People v. Williams, 202 A.D.2d 1004 (4th Dept., 1994)
[118] People v. McIntyre, 193 A.D.2d 626, *Lv. denied,* 82 N.Y.2d 757 (1993).

and a new trial because he had represented in voir dire that he was not a racist and did not have preconceived notions about guilt.[119]

There is a possible advantage derived from the detailed American voir dire because racially biased speech or behaviour in jury deliberations are a likely contradiction of previous testimony by the juror denying such opinions given during the voir dire. If a seated juror was asked during voir dire about any bias or prejudice and denied the same, and then expresses bias during deliberation, evidence of the juror's racist remark during jury deliberations has been found to be a basis to show perjury by the juror thereby warranting a new trial.[120]

However, demonstrating a single juror's bias will not necessarily result in a new trial. For example, an Appellate Court upheld a verdict even though several white jurors opined that Defendant's murder of the victim, a member of his own race, suggested that "he would not hesitate to kill a white person".[121] In essence, the trial court does have a duty to determine if the racist remarks demonstrated that the juror harbored sufficient prejudice to impact the verdict.[122]

---

[119] People v. Rivera 304 A.D.2d 841, 759 N.Y.S.2d 136 (2nd Dept., 2003); *See also*, People v. Whitmore, 45 Misc.2d 506 (Sup. Ct., Kings Co., 1965). The trial court upon motion after a hearing overturned a conviction in part based on racist comments during deliberations, with detailed portions of juror testimony included in the decision. *See also*, People v. Rukaj, 123 A.D.2d 277 (1st Dept., 1986); Court in dictum finds racist deliberations allegations should have prompted a post-trial hearing, revered on other grounds.

[120] U.S. v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2001).

[121] Fields v. Woodford, 281 F.3d 963, 975-976 (9th Cir. 2002); U.S. v. Henley, 238 F.3d 1111 (9th Cir. 2001).

[122] McDonald v. Pless, 238 U.S. 264, 268-269 (1915); U.S. v. Henley, *supra* note 120, 1119-1120.

Both the Court of Appeal and the European Court have placed great reliance on jurors following their oath and the curative value of proper judicial instruction where race is raised by the jury. For example, in the trial of a black man where the judge received a note from the jury stating: "Jury showing racial overtones. One member to be excused", the Court upheld a conviction where the judge recalled the jury and instructed that they put prejudice out of their minds and decide the case as required by their oath based only on the evidence.[123]

In R. v. Mirza the jury initially sent several notes questioning the Defendant's proclaimed lack of understanding of English and questioning why he would need an interpreter – including a note to the Court interpreter questioning "would it be typical for a man of the Defendant's background to require your services, despite living in this Country as long as he has?"[124] Counsel agreed to an admission that explained that the "Court proceedings ... are complex, serious and involve complicated legal terms. This (the interpreter) is a safe-guard...". Prosecuting counsel in a final speech told the jury they should make full allowances for Mirza's difficulties and defense counsel advised against prejudice operating when they considered their verdict. The judge directed the jury in his charge to draw no direct inferences.[125] The court prior to sentencing received a letter from a juror characterizing other jurors as racist and accusing the jurors of basing their verdict on the view that the use of the interpreter was a subterfuge. The letter asserted that the jurors viewed the judge's warning about prejudice as "playing the race card" and referred to the

[123] Gregory v. U.K. (1998) 25 E.H.R.R. 577.
[124] R. v. Mirza [2004] U.K.H.L. 2, #8a.
[125] R. v. Mirza, *supra* note 124, #64,65; R. v. Connor and R. Rollock [2004] W.L.R. 201.

other jurors several times as bigots.[126] The Court of Appeal declined to set aside the verdict and the Law Lords affirmed.

Mirza reinforces that the English rule regarding how and when to look beyond a jury's verdict remains the subject of controversy. Presently the ability to look behind the verdict is virtually non-existent by virtue of the common law and §8 of the Contempt of Court Act 1981 (Confidentiality of Jury's deliberations) which provides that "it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings." This is regarded as a codification of common law.[127] The Law Lords, based on their decision in Mirza, Connor and Rollock following the common law and the statute, limited any post-verdict inquiry despite post-verdict letters from jurors describing inferentially racist conduct in one deliberation and allegations of juror misconduct by failing to allegedly deliberate regarding a co-defendant because the jury found that the co-defendant was guilty virtually immediately after finding his fellow defendant guilty.[128] Holding that the deliberations in the jury room were privileged from disclosure and thus after further inquiry the Law Lords rejected the dissenting argument that a failure to engage in an inquiry as to misconduct in Mirza was potentially a violation of Article 6 of the European Convention in light of §3 of the Human Rights Act 1998.[129]

---

[126] R. v. Mirza, *supra* note 124, #67.
[127] Vaise v. Delaval , *supra* note 99; Ellis v. Deheer [1922] 2 KB 113; R v. Andrew Brown [1907] 7 N.S.W.S.R. 290 at 299; R. v. Miah [1997] 2 Cr. App. R. 12.
[128] R. v. Mirza, R. v. Connor, and R. v. Rollock [2004] 2 W.L.R. 201.
[129] In Gregory v. The United Kingdom [1998] 25 EHRR 577, the Court acknowledged the importance of the secrecy of jury deliberations. It did not pass upon an American/Canadian standard that allows looking at extrinsic non-evidential influences on the jury verdict.

The kind of issue raised in Mirza would potentially be addressed by voir dire in America and Canada. That England and Wales do not permit voir dire limits the ability of both the judges and counsel to learn of prior existing juror biases, in contrast to the American and Canadian approach.

American voir dire generally permits a very direct confrontation of the race issue between lawyers and prospective jurors. Misrepresentation in voir dire can be the basis for setting aside a jury verdict as discussed above. Canadian voir dire offers a more moderate approach.[130] In R. v. Parks the Court of Appeals for Ontario recognized that reliance on the presumption that jurors will follow their oath may be trumped by racial prejudice. Utilizing judicial notice to consider many studies indicating the existence of racial prejudice in Canada as the basis to overturn the conviction of a black defendant for manslaughter after a jury trial, the trial court refused to allow the following question to prospective jurors:

> "Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is a black Jamaican immigrant and the deceased is a white man?"[131]

In a more recent case the Appellate Court gave trial courts a clear right to take judicial notice of potential racial prejudice. The court reversed a trial verdict of guilty in a

---

[130]Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle Ground*, 62 Law & Contem. Probs 141. 144, 145 (1999) "In many important respects, the contemporary Canadian criminal jury may be viewed as hybrid of the English and American jury systems. This statement does not imply a direct American influence on the conception of the jury because...Canadian judges have often expressly rejected American practices and in the very recent past, tended to defer primarily to England when seeking guidance from case law.. Nevertheless, on a number of dimensions, Canadian jury law and practice occupies a middle ground between that of these two other countries."

[131]R v. Parks (1993) 24 C.R. (4th) 81, 84 C.C.C.(3d) 353, 150 R.(3d) 324, 65 O.A.C. 122 (CA.); *leave to appeal* to S.C.C. refused (1994) at 129 of OAC.

criminal heroin importation case where the trial judge refused to allow prospective jurors to be asked:

> "Would the fact that the accused are persons of Chinese origin and visitors from Singapore affect your ability to judge the evidence fairly and without prejudice?"[132]

The Court found that "all visible minorities" were eligible "for this minimal protection: based on the history of discrimination against visible minorities".[133]

Considering this decision with the prior nearly contemporaneous ruling of the Supreme Court of Canada, in which the court held that Canadian Aboriginals were entitled to question potential jurors for discrimination, there emerges judicial recognition of the corrosive effect of racial prejudice. Canadian courts in several major jurisdictions no longer require a threshold showing of possible prejudice where the potential is obvious, and permit voir dire of prospective jurors about racial prejudice.[134] The Supreme Court of Canada further eliminated a possible racist device by finding the Criminal Code provision permitting the Crown to stand aside jurors to be unconstitutional.[135]

American voir dire is famously more expansive than the less broad based right of inquiry in Canada, permitting questions about racial prejudice where that factor is a "reasonable possibility".[136] The lack of voir dire in England and Wales in comparable circumstances

---

[132] R. v. Koh (1998) 42 O.R.(3d) 668 at 671; 1998 Ont Rep. LEXIS 215.
[133] *Id.* at 681.
[134] R. v. Williams (1998) 1 S.C.R. 1128, 124 C.C.C.3d 481.
[135] R. v. Bain [1992] 1 S.C.R. 91.
[136] Aldrige v. U.S., 283 U.S. 308 (1931); Ham v. South Carolina 409 U.S. 524 (1973); and Rosales-Lopez v. U.S. 451 U.S. 182 at 191 (1981) per Justice White prejudice can be inquired about where there is a "reasonable possibility" that racial prejudice could influence the jury. (Generally described as "defendant accused of a violent crime and where the Defendant and

has provoked some concern about racial implications, principally by the Runciman Commission manifested in the form of a largely ignored proposal that at least three members from the same ethnic group as the Defendants be seated in exceptional cases (for example, violent response by blacks to racial taunts by extremist group).[137] The restoration of peremptory challenges as a way of resolving concerns about the racial composition of juries is contrary to the view of Lord Roskill:

> "The existence of the peremptory right of challenge must necessarily ... tend to erode the principal of random selection and may even enable defendants to ensure a sufficiently large part of a jury is rigged in their favor."[138]

This view is shared by the Court of Appeal (Criminal Division).[139]

Some have argued that the present majority verdicts "allow the views of extremists to be discounted in jury decisions. However, critics believe that this change was motivated more by a desire to save the expense of retrials and that it undermines the principle that guilt must be proved beyond a reasonable doubt".[140] While there have been studies which suggest that the use of peremptory challenges were not associated with an increased likelihood of acquittal, one must wonder if that is in part because the jury pool at the time of the study still lacked racial and ethnic diversity.[141] Chapter 3 will examine

---

victim are members of a different racial or ethnic groups"; Turner v. Murray, 476 U.S. 28 (1986) applies the standard to State death penalty cases.

[137] Viscount Runciman, Royal Comm'n on Crim. Just. Report (1993) [hereinafter Runciman Commission) at 133-134.

[138] Fraud Trial Comm. Report 1986 [hereinafter Roskill Report].

[139]R. v. Ford, [1989] 3 All E.R. 445 (Eng. C.A.).

[140]Sally Lloyd-Bostock and Cheryl Thomas *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62 Law & Contemp. Probs 7 (1999).

[141] Julie Vennard & David Riley, *The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Trial Outcome* [1988] Crim. L. Rev. 731.

whether race is an external influence on jury deliberations and how the comparator jurisdictions address the problem of race as an extra-evidentiary influence.

3. Jury Room Bullies

Bullying in the jury room is a recurrent post-verdict basis for applications to set aside verdicts in America. A typical example is the case of a recent criminal conviction of an attorney for aiding and abetting a terrorist. A post-trial motion was denied seeking to set aside the verdict because of bullying. The jury was anonymous and there was a post-trial order directing no contact between the attorneys and the jury members. A juror (who the attorneys were ordered not to contact post-trial) alleged that the other jurors subjected her to "a relentless verbal assault on my person and my position until I had no other choice but to relent because of the fear I felt". The juror both wrote to the trial judge and was interviewed by defense lawyers in violation of the court's order not to have contact with juror's post-trial without application to the Court.[142] In California, the State Supreme Court held that a fellow juror exclaiming to the lone hold out during deliberations who was an elderly woman, "If you make this all for nothing, if you say we sat here for nothing, I'll kill you and there will be another defendant out there – it'll be me", was not prejudicial misconduct impeaching the verdict.[143] The New York rule is that a jury verdict may not be impeached by statements going to the tenor of the jury's deliberations, thus claims of intra-deliberative pressure are rejected.[144]

---

[142] Julia Preston, *Juror says Her Guilty Vote was Coerced in Terror Trial*, New York Times, Sept. 2, 2005, page B2. The motion to set aside the verdict was denied.
[143] People v. Keenan [1988] 46 CAL.3d 478, 540.
[144] People v. Liguori, 149 A.D.2d 624 (2d Dept, 1989), People v. Maddox, 139 A.D.2d 578 (2d Dept., 1988), People v. Browne, 307 A.D.2d 645 (3d Dept., 2003).

In U.S. Federal Courts, evidence of intimidation that does not include extraneous influences or information or physical intimidation is inadmissible to impeach a jury's verdict where only intra jury psychological pressure is applied.[145] One court reasoned that allegations of these types of pressure are amenable to fraud by any juror who remained silent until after the verdict is rendered and thereafter made these claims pursuant to inducement.[146]

Jury room bullying is not a common claim in England and Wales or Canada, perhaps because of the limitation on post-trial interviews. In both jurisdictions jurors are prohibited by law from discussing the details of their deliberations, with no existing meaningful mechanisms for investigating the deliberation post verdict for bullying.

4. The Celebrity Juror

In America post-verdict juror interviews are a common element of notorious trial coverage. And while it is possible in the U.S.A. for a recanting juror to impeach his/her verdict in the Court of public opinion, courts of law are unlikely to look beyond the verdict unless there is an allegation of external influence.

The First Amendment to the United States Constitution provides a huge national distinction in what jurors can say post trial, making it unlikely that the provision of the

[145] U.S. v. Briggs, 291 F.3d 805 (7 Cir. 2002), U.S. v. Francis, 367 F.2d 805 (8th Cir. 2004).
[146] U.S. v. Eagle, 539 F.2d 1166, 1170 (8th CIR., 1976).

England and Wales §8 of the Contempt of Court Act 1981 which limits the ability of the press to question jurors post verdict would pass American constitutional muster.[147]

When jurors post trial disclose the details of jury deliberations, they create a potential risk best framed by Justice Cardozo in support of the notion of confidentiality in jury deliberations: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world".[148]

The high profile child molestation trial of Michael Jackson is a typical example. In a magazine interview after the trial, a Jackson juror Raymond Hultman is quoted as stating that "leading into the deliberations he and two other jurors believed Jackson was guilty". The entire jury gave a collective television post-trial interview discussing the deliberations as well as separate interviews to the assembled media. The jury foreperson in a published interview described the internal discussions and arguments in the jury room, setting forth in detail the process that resulted in the conversion of the minority in favor of conviction, culminating in a unanimous not guilty verdict:

> "Finally the three doubters accepted the view that the prosecution had come up short in marshalling the evidence". The doubters through Mr. Hultman stated, "I think Michael Jackson probably has molested boys, . . . but that doesn't make him guilty of the charges in this case".[149]

---

[147] In America there are a series of case decrying pre-publication restraint on the press. The part of §8 that limits the jurors ability to discuss deliberations probably does not pass American constitutional muster and thus to the extent §8 restrains the press, it would be unconstitutional.

[148] Clark v. United States, 289 U.S. 1 (1933).

[149] People Magazine, June 27, 2005 at pages 60-61.

Several other jurors were quoted as finding Jackson's fifteen-year-old accuser's mother, a main prosecution witness, to be self serving, unbelievable and an opportunist.[150]

This detailed post-trial interview in a widely circulated magazine accentuates the problem posed by post-trial juror interviews. Given the frequency of comparable articles post-verdict in other high profile cases, it is unlikely that any similarly situated jury will believe that the jury room debate is private. Moreover, jurors in a routine case may be concerned about the disclosure of jury room debate based on the public interviews in the high profile cases. Certainly it is difficult for the accused to claim vindication given that the jury regarded it as a case not proven even though there was a belief that Jackson was a child molester. The magazine commissioned a poll that showed that forty-eight percent of the surveyed disagreed with Jackson's acquittal and thirty-four percent agreed.[151] While jury verdicts should not and must not reflect vox populi – rather they are to represent the fairly weighed decision of the trier of fact based on the judicial instructions given to the jury, public confidence in the jury system is an important intangible element. However, the criminal justice system and the courts must promote good will and seek public confidence. "... trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives."[152] The explanation given by the Jackson jury demonstrates a reasoned basis for the verdict – applying the beyond the reasonable doubt standard they acquitted Jackson of the specific charges despite believing it was more likely than not that he was a child molester.

---

[150] *Id* at 60-61.
[151] *Id* at 60-61.
[152] Lord Devlin, *Trial by Jury* (1956) The Hamlyn Lectures (London: Stevens and Sons Limited, 1956) p. 164.

Unfortunately for the judicial system, the public story does not end here. In July of 2005, a few weeks after the Jackson "not guilty" verdict, several of the jurors who had during deliberations voted initially to find the defendant guilty and then changed their position, appeared on a television talk show (The Rita Cosby Show, MSNBC) to allege that the jury foreperson bullied them into finding Jackson not guilty. Both jurors, one of whom was the aforementioned Mr. Hultman, indicated that they were attempting to negotiate book deals and both announced that they believed Jackson was guilty of the specific charges for which he was tried and acquitted.

This event further elevates the concern that jurors, unlikely to believe that their deliberations will remain private after the verdict because of the prominence and frequency of post verdict interviews, may be unwilling to candidly deliberate, thereby jading intra deliberative debate and skewing the ultimate outcome. This problem may be addressed by limiting juror post-trial speech as will be discussed later in the chapter. It also prompts considering advising the jury that if they discuss the deliberations so that the details are exposed to public scrutiny, that also opens the door to subject the jury to judicial scrutiny including their personal testimony. This jury by its conduct would waive the protection of Lord Mansfield's rule and should be advised in the instruction that post-verdict discussions of the deliberative process may invite a proceeding at which they would testify under oath.

Consider the following hypothetical. What if Jackson had been found guilty and after the trial several jurors acknowledged that they voted to find him guilty based on their belief that he molested children, even though it was not proven beyond a reasonable doubt in

the case before them? Should there be a mechanism to challenge that verdict? It is unlikely that such a circumstance would warrant a hearing much less a setting aside of the verdict. The verdict was reached without extrinsic misconduct and the thought process described by the hypothetical juror's interviewed was exactly that – a thought process.

It is also unbelievable that jurors selected for a high profile case will first ponder prospective book deals or notoriety only upon the conclusion of the case after rendering the verdict. It is simply not plausible that this opportunity is not considered by empanelled jurors during the trial or deliberations. The extent that self interest of the juror or jurors impacts upon their decision making and thus, the outcome is a potential corruptor of the process. Likewise in a trial of local notoriety, if the present culture of post-trial jury room disclosure by fellow jurors of the details of deliberations leads jurors to anticipate a public post-mortem analysis of the deliberations, the intra-deliberative debate could become nuanced and stilted. Jurors should be able to verbally muse as to all options in the jury room without fear of the publishing of their thoughts. Because jurors may have concern about public reaction not only to their verdict, but the content of the debates and straw votes had during deliberations. With the loss of the candor and spontaneity of the jury's deliberations comes a diminution of that ingredient essential to any trial –fairness based on due deliberation.

The jury which convicted Lord Conrad Black on 5 of the 14 fraud and obstruction counts, in post trial interviews with the press, indicated that they were motivated to reach a verdict because a relative had advised a juror that the foreign press has said they were

"too stupid to understand the complex case" That prompted the defense team to announce that they had launched an investigation with the objective of moving to set aside the verdict.[153]

Conversely in other high profile cases juries have as a group declined to be interviewed and to comment on their verdict[154] or to only comment on the condition of anonymity.[155] The number of juries that comment as opposed to those who do not is unknown. Can we postulate that those juries who do comment have caused a potentially corrosive effect on public jury confidence?

While press interviews with jurors post-trial can be revealing, they may be viewed by the public at large, who are future jurors, with a jaundiced eye. It might be very different if the press accounts were reporting regular judicial incursions into the jury room, with full blown proceedings such as occurred in People v. Harlan, with jurors taking the stand forced to defend their deliberations because interviews given to the press suggest a miscarriage of justice.[156] People v. Harlan will be discussed in detail below.

---

[153] Mary Wisniewski, *Defense in Black Case Looks Into Jurors Remark,* Chicago Sun Times, July 17, 2007 at 12i, http//www.suntimes.com/business/hollinger/470995, cst-nws-conrad17.articles (July 17, 2007).

[154] Gary Gately, *Man Convicted in Costly Maryland Arsons*, New York Times, Sept. 3, 2005 at pg A11 "Ending the 13 day trial in Federal District Court, the jury of seven men and five women found Mr. Walsh guilty on 36 counts after deliberating about seven hours. Jurors declined to comment."

[155] Fernanda Santos, *Second Defendant is Guilty of Killing of College Students,* Fri. Sept. 30, 2005. New York Times B5 "We went over every piece of evidence. We looked at the testimonies again and again to make sure we came to the right decision" said one juror who spoke on the condition of anonymity because she said she feared reprisal "We're just regular people, but we all gave our blood, sweat and tears, and in the end, we think justice was served". Convicting two Brooklyn, N.Y. gang members in New York State Supreme Court of murder and robbery of a 19 year old college student.

[156] People v. Harlan, 8 P.3d 448, 2005 Colo. LEXIS 310 (2005).

5. The Confused or Mistaken Jury

Another example is also a real life and somewhat common situation, juror confusion or misunderstanding of the law or the judge's instructions. For example, jurors in a capital case who were given written instructions to take into the jury room, undisputedly misread the Judge's instructions. The jurors wrongly concluded that if they were a hung jury, unable to agree on the sentence, a life sentence would result. In fact, a hung jury would have resulted in a new sentencing proceeding. The sole holdout juror changed her vote to death in part because she was persuaded it was unfair to impose her will on the other eleven jurors who favored death. The holdout learned of her mistake post-verdict, contacted the judge and a post-trial application was made to no avail. This honest mistake was confirmed by several of the pro-death penalty jurors. The Court declined to set aside the verdict.[157]

The Federal Courts decline to set aside verdicts where the jury misunderstood or misapplied the evidentiary rules given to it.[158]

In Canada a verdict cannot be impeached because the jury misunderstood the judge's directions or ignored important evidence.[159] In New York likewise jury confusion is regarded as part of the jury's intrinsic deliberations and thus not amenable to

[157] Scott E. Sundby, A Life and Death Decision – A Jury Weighs the Death Penalty, (Macmillan, 2005) 90-123.
[158] U.S. v. Rutherford, 371 F.3d 634 (9th CIR., 2004).
[159] R. v. Dyson (1971) 5 C.C.C.(2d) 401 (ONT. H.C.J.) per Haines J.

impeachment of the verdict.[160] English Courts have routinely declined to probe juror reports of errors in verdicts.[161]

6. Failures to Deliberate

The internal events of the jury deliberations may include a deliberative process that that is violative of the juror's oath. The various jurisdictions are divided regarding whether or not such behaviour warrants a new trial.

The U.S. Federal Courts do not generally permit testimony about the reaching of a verdict by an improper method such as a majority vote (in a unanimous jurisdiction) or a chance manner such as drawing lots, although FRE 606(b) is silent as to the issue.[162]

New York takes a different view, holding that it was an error not to conduct an inquiry where a juror wrote a note to her employer before deliberations began that she would be making it to work "beyond a reasonable doubt".[163] A conviction was reversed and a new trial was ordered where during deliberations a juror sent a note to the judge indicating that several jurors reached a compromise verdict not based on the evidence but rather on a desire to finish the deliberative process. The note advised that one juror in particular the juror was voting contrary to any belief about the facts and law simply to complete the

---

[160] People v. Paz, 159 A.D.2d 987 (4th Dept.), lv. Denied, 76 N.Y.2d 793 (1990); on reconsideration, *lv. denied* 77 N.Y.2d 842 (1991).

[161] Lalchan Nanan v. The State [1986] A.C. 860, R. V. Milward [1999] 1 Cr.App.R. 61.

[162] F.R.E. 606(b) Advisory Committee's Notes (1972); Scoglin v. Century Fitness, Inc., 780 F.2d 1316, 1319-1320 (8th Cir. 1985) (The Court barred testimony by a third person that a juror advised that quotient verdict was used in a civil case, reasoning that the testimony was barred by F.R.E.606(b). Moores Federal Rules Pamphlet, 2005, Part 2 Federal Rules of Evidence, 606.5, p. 408.

[163] People v. McClenton, 213 A.D.2d 1 (1st Dept., 1995).

case. The Appellate Court criticized the trial judge's failure to determine whether that juror did in fact vote in a manner inconsistent with his views of the evidence.[164]

In California the narrow interpretation of the common law rule was expanded and it was permissible to impeach the verdict of the jury because the verdict was reached by lot, chance, showing of corruption, or statements in or outside of the jury room which would likely influence the verdict improperly.[165]

In Canada, the court did not consider the evidence of a Sheriff who, eavesdrops while standing outside a jury room, and as a result had overheard deliberations to the effect that the verdict outcome would be a majority vote:

> "The principle which precludes a court from accepting the evidence of a juror, either oral or by affidavit, as to what transpired in the jury room or jury box, for the purpose of impeaching their verdict, is equally applicable to the evidence of a stranger to such proceeding, regardless of how extensive may be his information or the manner in which it was obtained. It is only a matter of common sense to say that an allegation of impropriety or irregularity in the jury's deliberation, as suggested in the stranger's testimony, could only be properly met by calling members of the jury."[166]

In England and Wales the Law Lords were unmoved by a juror's report of a failure to deliberate with regard to co-defendant Rollock first finding him not guilty and fellow defendant Connor guilty after 6 hours and 46 minutes of deliberations. There was a disturbance within the jury box when the jury announced their verdict. The jurors were asked to retire to discuss their verdicts and returned in four minutes, finding both

---

[164] People v. Fermin, 235 A.D.2d 328 (1st Dept., 1977).
[165] People v. Spello, 6 CAL.App.3d 685 (1970, 2nd DIST); Johns v. City of Los Angeles (1978, 2nd Dist) 78 CAL.App.3d 983.
[166] R. v. Perras (1974) 18 C.C.C. (2d) 47, 51.

defendants guilty by a vote of 10/2. The Law Lords reasoned that it was obvious that there was deliberation about the commission of the crime by both defendants, thus the brief return to the jury room prior to rendering judgment did not cause a clear sense of miscarriage according to the Law Lords.[167]

B. Lord Mansfield's Rule Provokes Contemporary Debate and Exceptions But Remains Vital Despite American's Talking Jurors

In Tanner v. U.S. members of the jury post-trial acknowledged to being under the influence of alcohol during the trial. Despite that concession, the United State Supreme Court declined to order a hearing regarding allegations of jury incompetence and misconduct.[168]

Such a result provokes argument for the creation of a new threshold for the review of jury verdicts based on the image of an impaired partying jury, which is inconsistent with due deliberation. In practice, however, the jury's task is not amenable to standard retrospective legal scrutiny. For example, there is no transcript of the jury room deliberations. Unlike a legislative body, where the intent of the statute is of significance, the jury is asked to resolve factual questions based on the law presented by the judge. Thus, there is also no statement of intent authored by the jury as a whole or by individual jurors. The deliberative process followed by a jury will likely include debate, hyperbole, overstatement, invective, anger, compassion, and humor, but a single word verdict is the result. Juries do not give a written rationale to explain their verdict unlike a trial by judge.

---

[167] R. v. Mirza, Connor, and Rollock, *supra*, note 128.
[168] Tanner v. U.S.48 U.S., 107.

In his dissent, Lord Steyn, quoting Lord Devlin, makes a compelling argument that jurors are treated comparably to judges and thus the standard to evaluate juror conduct is a breach of the oath:

> "As the jury changed its character from a body of witnesses into a body of persons who had to determine facts on the evidence placed before them, it became a judicial tribunal and fit to be invested with judicial attributes. The Judges punished as misconduct any deviation by the members of the jury from judicial standards and as a contempt of court any interference by outsiders with the discharge of their judicial duties. There is no code embodying this. The rules came into existence piecemeal during the long period in which the jury was changing character. Jurymen are invested with judicial immunity. They have full judicial privileges and are not accountable for anything said or done in the discharge of their office, and any threats or abusive language directed towards them as jurymen is punishable as a contempt of court."[169]

Lord Steyn in R. v. Mirza argues for the application of this test as the basis for an exception to the rule –did the juror possibly violate his/her oath in the deliberations. This test is rejected by the Law Lords in favor of maintaining an absolute rule against probing into jury deliberations.

Violation of oath is not the present standard in England and Wales, where there is presently very little flexibility to the rule. As we have previously noted, the nearly absolute rule in England and Wales does have some exceptions, as in where a third party saw the jury misconduct,[170] or where the bailiff gave the jury extra evidential

[169]R. v. Mirza, *supra* note 128, at #6, quoting :ord Devlin, *supra* note 152, p. 41.
[170] Harvey v. Hewitt (1840) 8 Dowl 598, 599 Bailiff overheard the jury drawing lots.

information[171] or where a Ouija board was consulted in the jury hotel room while sequestered,[172] or where a juror did not understand English.[173]

The Ouija board case demonstrates that the present rule has provoked a tortured treatment by England and Wales of jury misconduct. Four members of a 12 person jury sequestered for the evening in a hotel consulted an ouija board which advised them that the defendant was guilty and the next day there was a unanimous vote for conviction. The trial judge was notified of this occurrence and permitted an inquiry into the jury's conduct at the hotel, reasoning that the event during hotel sequestration is not deliberations.[174] This is a rare distinction painfully reached carving out a dubious exception to address an obvious injustice.

Otherwise the Law Lords have strictly applied §8 of the Contempt of Court Act and the common law rule that the court will not investigate or receive any evidence about statements made in the jury room in the course of the jury's deliberations after they have retired to consider their verdict. The majority of the Law Lords in R. v. Mirza, R. v. Connor, and R. v. Rollock, accepts the intrinsic influence/extrinsic influence distinction established by Canadian courts and rejects both the American form of post-trial proceedings wherein the jury would be questioned regarding the potential misconduct but not about the actual deliberations and the violation of oath test of Lord Steyn.[175] In R v. Pan,[176] the Supreme Court of Canada drew a distinction between (a) statements made,

---

[171] R v. Brandon (1969) 53 CR. App. R. 466. Bailiff advised the jury of prior convictions
[172] R v. Young (Stephan), [1995] 2 Cr. App. Rep. 379.
[173] Ras Beharilal v. King-Emperor (1933) 50 T.L.R. 1.
[174] R. v. Young (Stephen) *supra* note 172..
[175] R. v. Mirza-; R. v. Connor; R. v. Rollock, *supra* note 124 per Lord Hope of Craighead at ¶120.
[176] R v. Pan; R v. Sawyer, [2001] 2 SCR 344, *aff.* 134 C.C.C. (3d) 1.

opinions expressed, arguments advanced and votes cast by members of a jury in the course of their deliberations, which were held to be inadmissible and (b) evidence of facts, statements or events extrinsic to the deliberation process whether originating from a juror or a third-party, that may have tainted the verdict, which were held not to be inadmissible under the common law rule.

By contrast, Lord Steyn, in his dissent in Mirza did not view Section 8(1) of the Contempt of Court Act as holding that the jury's internal deliberation is impenetrable where there is an apparent miscarriage of justice. Moreover, Lord Steyn asserts that the common law rule must be modified to detect and remedy miscarriages offering the potential of the juror oath as the basis for inquiry into juror behaviour.[177]

It is readily apparent from R. v. Young and R. v. Mirza that the actual deliberations are absolutely protected in England and Wales -- not to be disturbed by any report of misconduct, interpreting Section 8(1) of the Contempt of Court Act as an absolute prohibition from any inquiry into the deliberative events in the jury room:

> "To give the Court power, after verdict, to inquire into those deliberations, would force the door of the jury room wide open. If one dissentient juror or sharp-eared bailiff alleged irregularities in the jury room, the Court would be pressed to inquire into the jury's deliberations."[178]

---

[177] R. v. Mirza, *supra* note 124, at ¶5 Lord Steyn's reasoning is as follows: "One is not dealing with a cost benefit analysis: a miscarriage of justice bears on real individuals, their families, and communities. If the law requires a individual case to be subordinated to systemic considerations affecting the jury system, one may questions whether the law has not lost its moral underpinning" and at ¶17 "The Common Law rule is a judge made rule. Where the reason for a Judge made rule stops, it may be appropriate to qualify its reach ... So far as Judges have propounded a rule which, in light of experience, is potentially productive of injustice, it is not beyond their power to put it right."

[178] R. v. Young, *supra* note 172, at 382.

The Mirza majority clearly valued the finality of jury verdicts as outweighing the correcting of the occasional injustice.

Lord Steyn reasons that a caveat to the rule that would be based on the simple notion that breaches of oath are amenable to post verdict factual inquiry would not open the door to excessive review, but would permit examination of plausibly alleged injustices. This would include the spectrum such as a failure to deliberate, ouija board use and/or lots and racism.[179] He notes that while such a modification of the present rule may lead to more post trial applications regarding jury conduct this is not a sound policy reason to ignore all because it is likely some are true.[180]

The nuances noted by the Court in R. v. Young, where "possible extrinsic influences on a jury in retirement have been investigated by the Court", are narrow, ignore intrinsic misconduct and therefore truly not exceptions to the rule in support of Lord Steyn's argument.[181]

---

[179] Mirza, *supra* note 124, at ¶16, Lord Steyn notes that in R. v. Young, *supra*, counsel for the Director Public Prosecutions accepted the argument that "if the foreman of a jury took a coin out of his pocket in the jury room, the evidence about the tossing of a coin in the jury room to obtain a verdict was inadmissible".

[180] Mirza, supra note 124, at ¶12.

[181] R. v. Young, Note 172, at 383. The Court cites R v. Hood (1968) 52 CR. App.R. 265; R v. Brandon (1969) 53 CR App.R. 466 and R. v. McCluskey (1994) 98 C.R. App. R. 216; but each case the Court reasons did involve an inquiry into the actual deliberations, as Hood involved a juror acquaintance learned at trial, Brandon remarks by a bailiff to a juror about the Defendant's record and McCluskey the use of a cell phone from the jury room on business – all as possible extrinsic influences and not an inquiry into the deliberation. However the mechanism of inquiry differed. In Brandon the Court's inquiry was based on facts that formed the basis for a reference by the Home Secretary, by contrast in Hood the Court of Appeal considered the affidavit of a juror obtained post verdict. The Court reasoned that this was not interfering with the internal workings of the jury and extrinsic to the jury room deliberations because the contents of the Affidavit only dealt with whether or not the juror was aware of the Defendant's prior criminal convictions. The Court determined that the juror clearly was but examining "the formidable body of evidence against the accused man" the Court concluded that there was no miscarriage of justice. Hood at page 270.

In summary Lord Steyn argues that the "Court of Appeal has the power in exceptional cases to examine material regarding jury deliberations tending to show that the jury or some of them were false to their oath" while accepting the general rule that deliberations of the jury must remain secret.[182] His view remains outside the mainstream, but potentially resonant with time as we will see later in this chapter.

The Canadian application of the rule is comparable to England and Wales. As noted above in R. v. Pan,[183] the Supreme Court of Canada upheld verdicts in three cases, two tried concurrently, finding that the Canadian statutory requirements provide that jurors not discuss jury room deliberations post trial. Therefore any intrinsic factors discussed in the jury room could not be the subject of judicial inquiry, but extrinsic factors could be the subject of post-verdict review. Again this is the subject of lively debate, as a dissenter in the intermediate Appellate Court, Judge Finlayson assumed a posture similar to that of Lord Steyn and argued that the rule should be more flexible, advocating what he characterized as a case by case approach because it was "incumbent on the Court to do more than maintain blind allegiance to a rule that may work an injustice".[184] Judge Finlayson, like Lord Steyn, argued that remedies should be fashioned in a way that works justice in the particular case.

The most noteworthy exception to the hard and fast Canadian rule that intrinsic information regarding deliberations should not be considered is an isolated case where the Court investigated an allegation of third party communications to the jury, advising

---

[182]R. v. Mirza,, *supra* note 124, ¶8, 9.
[183] R v. Pan, *supra* note 176.
[184] *Id.*.

the jurors that they would be kept in deliberations if they did not reach a verdict. In addition, the jury believed that the trial judge could not be asked for a clarification as to what constitutes a hung jury.[185] The Supreme Court noted in Pan (*supra*) that this "appears to be the only Canadian decision which has allowed the disclosure of jury deliberations for the purpose of impeaching the verdict".[186]

The Supreme Court of Canada reasoned in R. v. Pan that finality is crucial to the justice system, that a jury is a judicial body and thus the processes by which it arrives at a verdict is comparable to judicial decision writing and therefore confidential. Noting that America does not have a statute in any jurisdiction comparable to S. 649 of the Canadian Criminal Code prohibiting jurors from public discussions of a jury verdict, the consequence for America has been the spawning of extensive litigation regarding Lord Mansfield's rule, generally adhering to the notion that intrinsic communications are not permitted, but "extraneous prejudicial information" and evidence about outside influences are admissible.[187]

If America were to impose restrictions on juror comment post trial, there is a legal thicket imposed by the First Amendment impeding any formal broad based prohibition on jury speech. One suggested path around the barrier is the argument that although the government cannot interfere "with the right of the press to publish jurors remarks, and perhaps with the publics right to solicit such remarks, restriction on the jurors right to talk may present lesser constitutional problems."[188]

---

[185] R. v. Zacharias (1987) 39 C.C.C. (3d) 280 (B.C.C.A.).
[186] R. v. Pan, *supra* note 176, at ¶66.
[187] *Id.*, at ¶66.
[188] Note: *Public Disclosures of Jury Deliberations*, 96 Harvard Law. Rev. 886 (1993).

Courts have in certain instances withheld juror's names and addresses by post trial orders directing that there be no discussion of jury deliberations post-trial between the media and the public and jurors have been viewed with disfavor by the Appellate Courts.[189] Other Federal Courts have restricted post verdict contact between jurors and the news media.[190]

The Circuit Court of Appeals for the Fifth Circuit may well have upheld the most cogent American procedure for juror post-trial interviews affirming a trial Court court order that held:

> No person may make repeated requests for interviews or questioning after a juror has expressed his or her desire not to be interviewed.
>
> . . .
>
> No interviewer may inquire into the specific vote of any juror other than the juror being interviewed.[191]

Other types of American juries are accorded this protection. For example, grand juries, the legally constituted body which renders indictments, in New York State operate in secret. Grand jurors are compelled by statute from disclosing "the nature or substance of any grand jury testimony, evidence or any decision result or other matter attending a

---

[189]Re Express News Corp 695 F2d 807 (5th Cir. 1985) (no showing of need to deny press access to jurors); U.S. v. Sherman, 581 F2d 1358 (9th Cir., 1978) (no showing of a clear and present danger or a serious imminent threat to a competing interest to the First Amendment); Journal Pub. Co. v. Mechem 801 F2d 1233 (10th Cir., 1986).

[190] U.S. v. Harrelson 713 F.2d 1114 (5th Cir., 1983), cert. denied 465 U.S. 1041, 79 L. Ed 714, 104 S.Ct. 1318; U.S. v. Franklin 546 F. Supp. 1133 (1982 ND Ind); U.S. v. Doherty 675 F. Supp. 719 (1987 D.C. MASS).

[191] U.S. v. Harrelson, *supra* note 190, at 1118; see also, In Re Express-News Corp, 695 F.2d 807 (5th Cir. 1982) at 810 "Jurors, even after completing their duty, are entitled to privacy and to protection against harassment"; and U.S. v. Gurney, 558 F.2d 1202 (5th Cir. 1977), explained in U.S. v. Harrelson at 1118 as follows: "There we held generally that members of the press, in common with all others, are free to report whatever takes place in open court but enjoys no special First Amendment right of access to matters not available to the public at large. The particulars of jury deliberation fall in the latter class, and the Courts narrow restriction was well within its discretion."

grant jury proceeding".[192] By analogy it has been argued that Landmark Communications Inc. v. Virginia[193] where the Supreme Court permitted the contempt punishment of those who breached the confidentiality of a judicial proceeding, indicates "that subsequent penalties for disclosures by participants in secret government proceedings would not violate the First Amendment".[194]

One influential American commentator has called upon American jurisdictions to adopt a prohibition comparable to the U.K.'s §8 of the Contempt of Court Act, 1981, and Canada's Criminal Code, recommending legislation that would make it a contempt to obtain, disclose or solicit and particulars of statements made, opinions expressed, arguments advanced or notes made by members of the jury in the course of their deliberations in any legal proceeding.[195] Despite an array of post-trial juror comment, the call has largely gone unheeded.

Recently a jury verdict imposing the death penalty was overturned after post trial contact between an investigator and a juror months after the trial raised the issue of jury misconduct.[196] The concerns of the majority of the Law Lords in Mirza that a post-verdict proceeding querying jurors could turn into an effort to examine the actual processes followed by the jury are vindicated, as that is exactly what happened in People v. Harlan. After the Defendant Harlan was convicted of capital murder and sentenced to death, an investigator for the defendant interviewed some members of the jury. Those

---

[192] N.Y. Crim. Proc. Law §190.254(a) (McKinney's 1993).
[193] 435 U.S. 829 (1978).
[194] Note: Public Disclosures of Jury Deliberations, *supra* at 903.
[195] Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Post Verdict Interviews* 6 ILL. L. Rev. 295 at 301-302 (1993).
[196] People v. Harlan, 8 P.3d 448, 2005 Colo. LEXIS 310 (2005).

interviews raised sufficient questions about the jury deliberations that the trial judge ordered a hearing regarding whether or not the jury during its deliberations was subject to extra-evidentiary influence, specifically reading by jurors of passages from the Bible during deliberations. The post-verdict hearing was to narrowly determine what factually in terms of extrinsic contact occurred and to decide whether this extrinsic material was used in the jury's deliberations. The trial court did not limit the proceeding to testimony simply about whether or not bible passages were used in the jury room as a part of the deliberations and the specifics of the passages.[197] The testimony in the hearing was not only that the jury read or had read to it several specific biblical passages from a Bible and a Bible index and handwritten notes during deliberations, it also included a detailed account of how the jury reached its verdict, including jurors testifying regarding their reasoning and describing the breakdown of the voting, contrary to the objective test used in Colorado. That test provides that to determine if the conduct prejudiced the jury, the court must weight what influence the improperly introduced evidence would have had on a typical juror and not on the specific jurors who rendered the verdict.[198] Thus, the trial court abandoned the test of whether the exposure would influence a typical juror or jury and sanctioned an inquiry into the jury's internal workings and thought processes. On appeal, the Court of Appeals decried the trial Court's failure to protect the jury's inner workings but still overturned the jury's verdict which imposed the death penalty,

---

[197] People v. Harlan, *supra* note 196, at 461, the dissent of Judge Rice is illuminating: "However, in this case, each of the 12 jurors testified not only about whether extraneous information was brought into the jury room, but also about what impact, if any, the presence of a Bible in the jury room had on those deliberations. As a result, there is no need to assess the impact of the biblical passages on the "typical" jury. Rather we know from the sworn testimony of the jurors themselves that not even one of the jurors was influenced by these biblical passages to vote for the death penalty, and thus, the biblical passages were not prejudicial."

[198] People v. Wadle, 97 P.2d 932 (2004); Wiser v. People, 732 P.2d 1139 (1987).

rejecting the prosecution's argument in that both sides had mentioned the Bible both in opening statements during the trial and closing statements, and rather found the biblical readings to be extrinsic, thereby justifying the original premise for the hearing.[199]

The facts in this case create a further irony. The jury charge in People v. Harlan instructed the jurors as follows regarding weighing the death sentence:

> "This consideration involves a process in which you must apply your reasoned judgment in deciding whether the situation calls for life imprisonment or the imposition of the death penalty.
>
> . . .
>
> You must still all make a further individual moral assessment of whether you've been convinced beyond a reasonable doubt that the death penalty instead of life in prison is the appropriate punishment."[200]

Presumably a part of that moral judgment could have been based on biblical references that were made by lawyers and witnesses during the trial. The referencing of the Bible during summations introduced extrinsic evidence, therefore the moral reasoning of the jurors during the deliberation could reference those quotations and references.

Moreover, during voir dire a juror who was later involved in the intra deliberative use of the Bible was asked whether he ascribed to the idea of an eye for an eye, he replied, "No, I can't", stating that his philosophy shaped by his readings of the Bible was "to be as fair as I can in everything that I do". The defendant's father, who voluntarily turned

---

[199]People v. Harlan, *supra* note 196. The specific biblical references heard by the jury were Leviticus 24:202:N3 "fracture for fracture eye for eye, tooth for tooth, as he has caused disfigurement of a man, so too shall it be done to him. And whoever kills an animal shall restore it, but whoever kills a man shall be put to death." Also Romans 13:1 "let every soul be subject to the governing authorities for there is no authority except from God and the authorities that exist are appointed by God". From the juror testimony post hearing.

[200] People v. Harlan, *supra* note 196.

incriminating evidence over to the police, indicated in his testimony during the sentencing phase of the trial that he had not given up on his son consistent with the teachings of the Bible, stating, "God never gave up on a living man, I won't either", and that "God gave life and only God can take it."[201]

In the summation during the trial the defense counsel, noting that there had been testimony that the defendant had read the Bible with his father, compared the defendant's father to the biblical figure Abraham, incorporating those references to the Bible into the defense's plea for mercy. As noted above, the Supreme Court found that this was not a waiver and modified the death sentence to life without parole based on the extrinsic biblical information.

The foregoing incursions into the jury's deliberative process accentuate the continued relevance of the rule and the risks associated with carving out exceptions to it. Modifying the American rule to permit jurors post verdict to discuss their own views but not views of other jurors, may be a reasoned compromise. Allowing courts in Canada and England and Wales to inquire into plausible allegations of racism, physical bullying, and violations of the juror's oath such as non deliberation or drawing of lots would protect against documented miscarriages of justice.

IV. Juror Privacy and Protection

A. Juror Rights

Jury duty in the U.S. may appear to be the very definition of a hostile work place. Herded around by authority figures in groups, required to give intimate details about their

[201] People v. Harlan, *supra* note 196. Dissent of Judge Rice.

life in front of a gathering of strangers that includes a person charged with a crime and his/her family and friends, they are given restrictions as to who they may speak with and the content of their speech, even bathroom use is regulated by an authority figure. They are unable to ask questions without permission, but are charged with the ultimate responsibility for the freedom of another based on facts presented by question and answer. That person may be very dangerous and may have dangerous friends. They are forced to render a verdict in public in front of the defendant and his/her family and friends and are discharged without security outside of the courthouse even though the Defendant likely knows where they live.[202] The foregoing circumstances reflect situations which provoke emerging concerns in America. In neither England and Wales, nor Canada do these concerns presently seem as prominent.[203]

It is only in the last part of the 20th century that there has been serious consideration that jurors actually may have rights and then only in limited quarters. For example, Harry Kalven Jr. and Hans Zeisel in the highly regarded book "The American Jury" made no reference to jury privacy issues or juror rights.[204] More recently in England and Wales, the Auld report makes no mention of jurors' rights (although specific recommendations to make jury duty less onerous are set forth).[205]

Both California and New York have developed statutory schemes which are highly protective of jurors' privacy rights in criminal cases. Both states limit public access to

[202] Citizen's Jury Project, Spring 2003, Report on Juror Concerns, December 1, 2002.
[203] *See* for example, The Auld Report (2001), *supra,* note 16, and Christopher Granger, *The Criminal Jury Trial in Canada* (2nd Edition 1996, Carswell), neither raising jury rights as an issue but each commenting on the need to improve jury accommodations.
[204] Harry Kalven Jr., and Hans Zeisel, *The American Jury*, (1966).
[205] As noted earlier, this report did call for a broadening of the jury pool, which became law, and rejected American style voir dire.

jurors' private information over and above name and age. In each state access to the jurors private information requires an application to the Court, in California to the trial Court in which the juror served[206] and in New York to the Appellate Division, the State's intermediate Appellate Court.[207]

The State of California has structured one of the most comprehensive systems in the U.S.A. for juror privacy and protection. Jurors' names, addresses and telephone numbers are to be sealed subject to further order of the court. Under the California statutory scheme anyone may petition for these records, but good cause must be shown to be weighed against a compelling interest in the protection of juror identities. Recall however that the Michael Jackson trial which occurred in California Superior Court, was governed by these rules. The rules were effectively negated by the jury's post trial disclosure of their names and the detailed description of the deliberations, epitomized by the entire jury holding a press conference post-trial and thereafter repeated separate public interviews.[208]

The California statute defines compelling interest as protecting jurors from threats or danger or physical harm, but does not specifically acknowledge a right to privacy.

---

[206] Cal. Civ. Prac. Code §206(b) gives jurors the absolute right not to discuss their verdict or deliberations with anyone and requires their consent before contact. Cal. Civ. Prac. Code §237 strengthened jurors protections by permitting sealing juror information after a criminal case where there was a compelling governmental interest. Both sections permit the defense to apply for the information on notice to the prosecution and the jurors.

[207] New York Judiciary Law §508 (McKinney's Pocket Part pg. 24) provides that juror questionnaires and records "shall be considered confidential and shall not be disclosed except to the County Jury Board or as permitted by the Appellate Division". Newsday v. Sise, (1987) 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, certiorari denied 108 S.Ct. 2823, 486 U.S. 1056, 100 L.Ed.2d 924; Herald Co. V. Roy (4th Dept., 1985) 107 A.D.2d 515, 487 N.Y.S.2d 435, appeal dismissed 65 N.Y.2d 922, N.Y.S.2d 1031, 483 N.E.2d 135, appeal denied N.Y.2d 610, 494 N.Y.S.2d 1025, 484 N.E.2d 1052.

[208] People Magazine, June 27, 2005 at pages 60-61.

However, there is an implied recognition of juror privacy rights in the form of a statutory provision which requires the court to give jurors notice of any application for the release of their names and other information and it allows the jurors affected to appear in writing, in person, by telephone, or through counsel to oppose the application. The court may in its discretion hold a hearing on the application or in the alternative may grant the relief or deny the application setting forth its reasons.[209]

While minimal by the standard of England and Wales, the limiting of post trial access to jurors by American courts has incited press concern about the First Amendment right of access to information about the judicial system, coupled with ongoing questions as to whether or not that right attaches during the trial (including voir dire) and subsequent to the trial.[210]

Following California's example, the Colorado Supreme Court over and above their statutory scheme, adopted revised rules of procedure for all State Court proceedings

---

[209]California Civ. Prac. Code §237 (West 1996). While other states have enacted measures protecting juror privacy, this law is undisputedly the most comprehensive statute in America protecting juror rights. Comparable statues are: Tex Cod Crim. Proc. Code Ann. 35-29 (West Supp. 1997) Colo Rev. Stat. 13.71.136 (1999).

[210]*See* In re Disclosure of juror Names and Addresses, 592 N.W.2d 798 (Mich. Ct. App. 1999) (surveying the case law on the subject; in re Globe Newspaper Co., 920 F.2d 88, 93 (1st Cir. 1990) (although decided on statutory, not constitutional grounds, stating that "impounding juror names implicates the press. First Amendment right of access to criminal trials"); Contra Costa Newspapers, Inc. v. Superior Court, 72 Cal. Rpt. 2d 69, 72 (Cal. Ct. App. 1998); Sullivan v. National Football League, 839 F.Supp. 6 (D. Mass 1993); In re Indianapolis Newspapers, Inc., 837 F. Supp. 956 (S.D.Ind. 1992); State v. Swart, 20 Media L. Rep. 1703 (Minn.Ct.App. 1992); United States v. Butt, 753 F.Supp. 44 (D. Mass 1990); U.S. v. Doherty, 675 F.Supp. 719 (D. Mass. 1987), *aff'd* in part, *rev'd* in part on other grounds, 867 F.2d 47 (1st Cir. 1989); *see also* In re Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988) (mandating access to jurors' names and addresses under common law). In the following case, courts have granted access under the First Amendment to completed juror questionnaires (which invariably contain jurors. addresses): In re Application of Wash. Post (United States v. George), 20 Media L. Rep. 1511 (D.D.C. 1992); Copley Press, Inc. v. San Diego County Superior Ct., 278 Cal.Rptr. 444, 18 Media L.Rep. 1800 (Ct.App. 1991); Lesher Communications, Inc. v. Superior Ct., 274 Cal.Rptr. 154, 18 Media L.Rep. 1331 (Ct. App. 1990).

which seals "locating information of jurors" (particularly addresses) – both as to jurors are participating in open court as empanelled jurors or through disclosure of court records.[211]

The U.S. Supreme Court has held that the public and the press have the right to attend both jury selection and the actual trial in criminal proceedings, with the caveat that criminal juries can be anonymous upon the demonstration of good cause as mentioned above.[212] The press cannot be enjoined from publishing the names of anonymous jurors if they obtain the same, as such a injunction is an unconstitutional prior restraint of the press in violation of the First Amendment.[213]

In California those statutes protecting jurors' privacy have received broad application, with one Appellate Court concluding that a juror's refusal to be contacted post verdict constitutes a compelling governmental interest which permits the Court pursuant to statute to not release the juror's private information, in part because the history of California statutes includes incidents of jurors being threatened post verdict.[214] If the defendant finds evidence of juror misconduct or external influences the judge may upon

---

[211] 27 Colo Law. 101, 103.07 (Aug. 1998) Publication of newly amended Colo R. Civ. P. 47 (a) (4) and 347 (a) (4) and Colo. R. Crim. P 24 (a) (4).

[212] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980), Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) [Press Enterprise I] (holding that a First Amendment right of access applies to voir dire proceedings); Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) [hereinafter Press-Enterprise II][holding that a First Amendment right of access applies to preliminary hearings].

[213] U.S. v. Brown, 250 F.3d 907 (5th Cir. 2001).

[214] Jones v. Superior Court of San Diego County, 26 Cal. App. 4th 1202; 31 Cal Rptr 2d 890, 107 A.D.2d 515 (1994); Cal. App. LEXIS RPTR 745 (1994) page 1209.

such a proper showing compel the juror to attend court and be questioned at a hearing by the judge.[215]

New York State by virtue of statute and decisional law will not release specific juror information such as name, address and telephone numbers, without an order of the Appellate Division, the State's intermediate appeals court.[216] It is settled law in New York that while jurors' names generally are publicly announced during jury selection, obtaining the same thereafter requires such an order.[217]

England and Wales jurors do not have the right to speak post-verdict but they are also protected from post-verdict interviews. Indeed the Courts routinely remind jurors of this obligation both in the judge's charge and by notices in the jury room.[218] The Diplock Commission identified the threat of intimidation as a factor in the decision to try alleged Northern Ireland terrorists by Judge and not jury in Northern Ireland as of December 1973. Juror intimidation was disputed as a demonstrated basis for the use of non jury Diplock trials, the proof of jury intimidation utilized by the Diplock Commission having been characterized as "anecdotal and sketchy".[219]

Jurors' identities are protected in England and Wales by Contempt of Court Act 1981 Section II which permits a court to prohibit "the publication of that name or matter in

---

[215] Jones v. Superior Court of San Diego County, 26 Cal. App. 4th 1202; 31 Cal. Rptr 2d 890, 107 A.D.2d 515 (1994); Cal. App. LEXIS Rptr 745 (1994)

[216] New York Judiciary Law §509 *(McKinney, 2007).*

[217] Newsday v. Sise, (2nd Dept., 1986) 120 D.D.2d 8, 71 N.Y.2d 146, *certiorari denied* 108 S.Ct. 2823 (1987); Herald v. Roy, 107 A.D.2d 515, 487 N..S.2d 435, *appeal dismissed* 65 N.Y.2d 922, 1031 *appeal denied* 65 N.Y.2d 610.

[218] Philip Anisman and Allen Linden, The Media, The Courts and The Charter (Allan Manson Ed., Carswell, 1986) pg 324.

[219] S.C. Greer and A. While, Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offenses in Northern Ireland, p. 52 (London; Cabden Trust 1986).

connection with the proceedings as appear to be necessary for the purpose for which it was withheld". Previous to the passage of this statute, common law prohibition orders were issued in a variety of settings.[220] While this section does not permit magistrates to confer anonymity on themselves,[221] the distinction between magistrates and jurors is accentuated by the protections accorded jurors in Contempt of Court Act, 1981, Section 8.[222]

There are, however, glimpses of what England and Wales jurors think – and it ranges from decrying the absence of amenities in the courthouse to the notion that English jurors can ask questions, which is an option that is available but discouraged in the view of one former juror.[223] In Chapter 9 the views of England and Wales jurors and judges regarding the trial process will be more fully discussed.

---

[220]Clive Walker, Ian Cram and Debra Brogarth *The Reporting of Crown Courts Proceedings and the Contempt of Court Act* (1981) 647 The Modern Law Review 55:5 65 (Sept. 1992).
[221]R v. Felixstowe Justices, Exparte Leigh (1987), Q.B. 582.
[222] S.H. Bailey, *The Contempt of Court Act* [1981] 45 Mod. L.Rev. 301 [1982] at 310-31, describing the jury interview after the trial of Jeremy Thorpe. In passing the Act the House of Lords concluded that "any approaches to jurors were unacceptable, whether by "respectable professors from Birmingham", "Marxist professors from the English Faculty at Cambridge" by "any scriber or any journalist" or by that "most dangerous animal, the sociologist'". H.L. Deb, Vol. 416, Cols 371 (Jan. 20, 1981) (Lord Hutchinson).
[223]Stephen Lofthouse [1992] *The Trials of a U.K. Juryman,* 142 New Law Journal 561. "After my spell in court I re-read "Jury Service: An Explanatory Leaflet" which is sent to jurors when they are summoned. (The leaflet is printed in small typeface and is about as seductive a read as Inland Revenue explanatory notes.) In a section headed "Asking Questions" it is stated that:" "A juror may write down a question and ask the usher to pass it to the judge". But the inquisitive juror is put in his place by the following sentence: "Remember the answer may be just around the corner so wait until you are sure you need to ask a question. Remember also that the rules of evidence may not allow certain questions to be put."

B. Anonymous Juries, Invasive Voir Dire, and Juror Mental Health

American jurors are uniquely and increasingly public players in the trials in which they deliberate. They are named in court routinely and are only anonymous on application to the court with good cause shown.[224]

In Canada, while jurors may be identified upon being called in certain provinces, they may also be anonymous in others.[225] Canadian voir dire is far less invasive than in the U.S., although both challenges for cause and preemptory challenges are allowed as discussed earlier. A minimal number of questions are permitted which are submitted to the Court prior to questioning for approval.[226]

American jurors are subject by name to detailed voir dire in many hideous criminal cases. There are, however, few reports of jurors being threatened and harmed, with a zero death rate.[227] Fear and intimidation are not uncommon complaints as in the case where a juror was discharged as grossly unqualified during a drug trial. The sworn juror stated that she was frightened that "the people in this drug thing may know me" and she expressed unequivocal fear of retribution.[228]

---

[224] U.S. v. Barnes, 604 F.2d 121 (2d CIR. 1979).

[225] Christopher Granger, The Criminal Jury Trial in Canada (2d Ed. Carswell 1996) 332; Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 Judicature 249 (1976) at 351. No information was given to the lawyers during jury selection in the criminal trial of Paul Bernardo except answers to eight questions. Names were not given.

[226] David M. Tanovich, et al., *Jury Selection in Criminal Trials, supra,* 147.

[227] Abraham Abramousky, *The Choices Surrounding Use of Anonymous Juries*, NYLJ, Sept. 11, 1993 at 3.

[228] People v. Santana, 221 A.D.2d 175 (1st Dept., 1995), *leave to appeal denied* 95 N.Y.2d 962. *See also*, People v. Chavez, 275 A.D.2d 888 (4th Dept., 2000) juror sobbing out of fear; and People v. Tisdale, 270 A.D.2d 917 (4th Dept., 2000), *leave to appeal denied*, 95 N.Y.2d 839.

However, a California court attributes the present level of statutory protections accorded jurors to a near miss – a murder case where the defendant murdered his wife and solicited his daughter's murder hired a private investigator to get the addresses of members of his jury "for the presumed purpose of working harm",[229] and as noted above jurors report fear of the defendant to the court in more than isolated instances.[230]

Jurors reporting fear to judges, jury administrators and academics is not uncommon in most jurisdictions.[231] Jury interviews in both murder and rape cases indicate juror fear of the defendant. For example, two jurors in a rape case during the voir dire reported answering personal questions from her jury questionnaire at the bench in the presence of several men in suits and ties. The questions included the area of the community in which she resides and the status of her children. Both jurors were surprised to learn shortly thereafter that one of the men listening during the questioning was the defendant.[232]

Despite the paucity of incidents of actual jury retribution, there are well documented reports of taunts, threats and adverse publicity directed toward jurors post-verdict.[233]

Jurors may well experience psychological trauma as a result of jury service although the precise inciting mechanism of the harm is difficult to establish given that the experience

---

[229] Jones v. Superior Court of San Diego County, 26 CAL.App.4th 1202; pg. 1209 quoting Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1200, 1991-92 Reg. Session.

[230] People v. Carrasco, 262 A.D.2d 50 (1st Dept., 1996); People v. White, 204 A.D.2d 750 (2nd Dept., 1994).

[231] Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials,* 49 Vand. L. Rev. 123, 1996. *See also*, Fernanda Santos, *Second Defendant is Guilty in Killing of College Student*, New York Times, Sept. 20, 2005 at B5.

[232] Author interview with jurors.

[233] King, *supra* note 231, page 128-129.

of sitting in judgment, hostilities that generally occur during the trial, deliberation and the actual weight of rendering the verdict are all possibilities.[234]

Several independent studies found that jurors in significant cases, such as murder cases, have experienced post-verdict lingering emotional and physical problems associated with jury service.[235] A larger study concluded that jurors in both traumatic and not traumatic trials did not develop secondary post-trial stress disorders. However, the study did find that jurors in traumatic trials:

> 1) "Were almost six times more likely to develop a sufficient number and type of symptoms to meet the DSM-III-R symptom criteria for depression than jurors serving on non-traumatic trials".[236]
>
> 2) Had a statistically significant higher rate of depression than the rest of the population.[237]

While some advocate providing care for jurors post-trial as well as debriefing sessions for jurors to reduce post trial consequences,[238] there are no cohort studies presently in place which follow jurors in traumatic trials for a sufficient period of time to permit the conclusion that jury service has a long-term impact upon jurors. Despite the fact that some jurors in traumatic trials are situationally depressed by the trial, there is presently no evidence that the depression impacted their decision making as jurors.[239] To the

---

[234] *Id.*,128-129.

[235] Stanley M. Kaplan & Carolyn Winget *Occupational Hazards of Jury Duty* 20 Bull. Am. Acad. Psych. & L. 325 (1992). Forty interviews with jurors in violent criminal cases found twenty-seven with post-trial physical and mental complains ranging from bad dreams to pos-traumatic stress types of complaints.

[236] Daniel W. Shuman, Jean A. Hamilton, Cynthia E. Daley, *The Health Effects of Jury Service,* Law & Psych. Rev. 267 at 298 (Spring, '94).

[237] *Id.*, at 298. A questionnaire was mailed to 312 jurors in traumatic and non-traumatic cases – 79 jurors who served on traumatic juries and 73 who served on non-traumatic juries answered. Thus it was a larger and more scientific study than the Kaplan study.

[238] James E. Kelly, *Addressing Juror Stress: A Trial Judge's Perspective,* 43 Drake L. Rev. 97 (1993-1995).

[239] Shuman, et al, *supra* note 236, at 302.

contrary, given the gory subject matter of traumatic trials, it could be reasonably assumed that depression is a foreseeable consequence of the event.[240] One barrister has aptly described jury duty as not so much the proverbial fifteen minutes of fame but an experience more akin to fifteen minutes of dental surgery.[241]

A solution advocated by some is the anonymous jury, a concept that can vary in definition. G. Thomas Munsterman and Paula L. Hannaford of the National Center for State Courts define the routine use of anonymous juries as follows:

> "As a matter of routine practice, the courts withholds the names, addresses, and other identifying information about jurors and their families form the parties, their counsel, the public, and the media. The technique can be sued for either civil or criminal trials. Procedurally, "'[T]o impanel an anonymous jury, the court assigns a number to all persons called for service. This number functions as the juror's identification number for the entire term of jury service. The summons for jury service instructs each member of the jury panel to report to court and to identify him or herself using the assigned number. Alternatively, the court assigns the juror identification number when the jury panel member first reports for service. All references to the juror (e.g. in jury questionnaires, voir dire, and trial proceedings) that are accessible to the parties, their counsel or the public or media are made according to this identification number".[242]

All Federal Circuit Courts have permitted anonymous juries of public trials in lieu of named jurors, based on a two part test associated with this exception to general rule. There must be a real or actually perceived risk to jurors and a proper expression to the jury of an explanation for anonymity that is not prejudicial to the Defendant.

---

[240] Two death penalty opponents, Scott E. Sunby, *A Life and Death Decision, A Jury Weighs the Death Penalty*" (2004, Macmillan); Benjamin Fleury-Steiner, *Jurors Stories of Death,* (2004 University of Michigan Press) provides instances of juror post-capital verdict remorse and depression – but these are not supported by scientific clinical studies.

[241] John Cooper, *Excessive Strain Falls on Jury Members.* The Lawyer, May 8, 2000.

[242] G. Thomas Munsterman and Paul L. Hannaford, Jury Trial Innovations 83 (1997).

Anonymous juries are not routinely granted where there is no showing of risk to jury safety.[243]

The anonymous jury is defined differently in New York --it means the name is withheld. As noted above because in New York the juror's name is routinely provided but no other detail, a totally anonymous jury can be empanelled upon a proper showing.[244]

In California anonymous juries are empanelled without names, addresses, and other identifying information, with some frequency upon showing a compelling reason, generally defined as juror safety or potential for media intrusion into the jurors lives.[245] In an intriguing twist in one California case the trial court upheld an anonymous jury for the purpose of trial, but suggested that the defendant make an application for disclosure of the jurors' names post trial in order to develop their prejudice argument.[246] A number of other states also allow anonymous juries, requiring the showing of cause for such a jury, with the decision to empanel an anonymous jury resting within the discretion of the trial judge so long as such an empanelment occurs in a manner that avoids prejudice to the defendant.[247] Other states view jury anonymity simply as providing juror names to counsel but withholding the same from the press.[248]

---

[243] United States v. Millan-Colon, 834 F.Supp. 78, 83-86 (S.D.N.Y. 1993).
[244]People v. Watts, 173 Misc.2d 373, 661 N.Y.S.2d 768 (Sup. Ct. 1997).
[245]Erickson v. Superior Court,55 CAL..App.4th 735, 64 Cal.Rptr.2d 230 (3d Dist. 1997).
[246] People v. Phillips, 56 Cal. App. 4th 1307, 66 Cal.Rptr.2d 380 (2d Dist. 1997); *reh'g denied*, (Sept. 3, 1997) and *cert. denied,* 118 S.Ct. 1395.
[247] William D. Bremer, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R.5th 39 (2005).
[248]William D. Bremer, *Propriety of Using Anonymous Juries in State Criminal Cases, supra.*

While routine use of anonymous juries is advocated as a means to improve juror confidentiality as well as decrease real and perceived risks to jurors,[249] anonymous juries are adamantly opposed by most civil liberties groups and defense lawyer organizations.[250]

> "The use of anonymous juries, almost unthinkable in an American Court even thirty years ago, is now touted as a panacea for everything from jury tampering to "juror stress" and threatens to alter the very concept of voir dire."[251]

The American use of the anonymous jury commenced in U.S. v. Barnes.[252] It was sanctioned as a device to protect the safety of jurors in a case where a notorious drug dealer was on trial. The trial court held that there would be no voir dire on the juror's names, addresses, religion and ethnic backgrounds based on a showing of risk to the jurors.

U.S. v. Barnes prompted concern as anonymous juries have evolved into more common use, that by its very essence, anonymity would limit the effectiveness of peremptory challenges.[253]

While some commentary about anonymous juries was benign, simply noting that "A. novel aspect of the Barnes decision was the argument that voir dire inquiry should be

---

[249] *Id.*
[250] Nancy J. King, *Nameless Justice: The Case for the Routine use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123 (1996).
[251] Abraham Abramousky and Jonathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John's J.Leg. Commentary 457 (1999).
[252] 604 F.2d 121 (2d Cir. 1979).
[253] Robert J. Christians *Voir Dire – Defendants Are Not Deprived of the Intelligent Use of Peremptories by Voir Dire Restrictions Intended to Protect Potential Jurors Safety and Privacy*, 55 Not. Dame L. R. 281 (1979).

limited in order to protect jurors' rights of privacy",[254] other comment concluded that if there were a balancing of rights, the Defendant's right to "a fair trial outweighs any speculative injury to the jurors' privacy".[255]

The right to voir dire has been recognized by the U.S. Supreme Court to a limited extent, but the Court has not given clearly defined perimeters establishing the scope or limits of voir dire. For example, inquiries into a juror's religion has been permitted where the defendant was a Jehovah's witness, and his religious beliefs were likely to be discussed at trial, as is inquiry into racial bias where the Defendant is a minority or of a race different from the prospective juror. These inquiries are only permitted on a showing of compelling interest.[256]

Juror privacy rights were acknowledged by the Supreme Court in 1984, but the Court noted that those privacy rights had to be balanced against the rights of the accused.[257] While the Supreme Court did not articulate the basis of the juror privacy right, Weinstein argues that Whalen v. Roe created "a second strain of the privacy: the "individual

---

[254] Case Comments – *Voir Dire Limitations Intended to Protect potential Jurors Safety and Privacy,* (1979) 55 Not. Dame. L. 281.

[255]Serena Kafker, *The Defendant's Right to An Impartial Jury and the Rights of Prospective Jurors*, 48 University of Cinn 985 (1979). See also, Christians, *supra* note 254, page 288, note 57 which lists a few of the questions asked in Barnes like experiences with firearms, narcotics, the law, racial attitudes. The Barnes voir dire was lengthy and detailed *see supra* note 253.

[256] Pointer v. U.S., 151 U.S. 396 (1893); Swain v. Alabama, 38 US 202 (1965) Daily v. U.S., 139 F.2d 7 (7th Cir. 1943). *See also* Hain v. South Carolina, 409 U.S. 524 (1973) inquiry regarding racial bias appropriate.

[257]Press Enterprises v. Superior Court of California, 464 U.S. 501 (1984). The issue before the Court was public access to voir dire. The Court stated that "The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain". At 511.

interest in avoiding disclosure of personal matter".[258] Weinstein further argues that this privacy right has been extended to financial records, medical history and family life,[259] using as the measurement of the disclosure of intimate information:

> "the degree to which the person seeking to prevent disclosure has sought to expose him or herself to public scrutiny, the breath of the potential disclosure, the adequacy of safe guards to prevent public disclosure, the potential injury that might result therefrom and the type of information sought".[260]

Utilizing the standard set forth by Weinstein, jurors cannot and should not be viewed as seeking public attention by virtue of engaging in jury service and their privacy should be protected zealously by the summoning government. They should be apprised of their rights in this regard upon the commencement of jury service.

As part of an endeavor by American courts to protect jurors post-verdict, lawyers have been limited in some states from post-verdict contact with jurors for self education purposes as well as to discover grounds for impeachment of the verdict or to discover if the jurors were biased or not properly qualified.[261] U.S. Courts have denied applications by the defendants and the press for juror information so that post trial interviews or

---

[258] David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temple L.Rev. 1 (1997). The first strain of privacy rights according to Weinstein encompasses "an individual's autonomy in making certain personal decisions", cited in N17 as cases involving contraception, abortion, and marriage. Whalen v. Roe, 424 U.S. 589 (1977) at 599 and Nixon v. Administrator of General Services, 433 U.S. 425 (1977). In Whalen the Court considered the right of privacy of patients receiving dangerous medications against the State's right to regulate the same. In Nixon the Court upheld the right of the public to see certain of former President Nixon's papers.

[259] *Id.*, pg 5.

[260] *Id*, at 6.

[261] Dale R. Agathe, *Propriety of Attorneys Communication After Trial* 19 A.L.R. 4, 1209 (2000).

polling of the jurors could be conducted.[262] In one case an Appellate Court ordered the judge to lift an order prohibiting all press contact with former jurors because it was a prior restraint on the exercise of First Amendment rights that was not narrowly tailored.[263]

C. Invasive American Voir Dire

The common notion regarding the American jury trial is that voir dire exposes jurors darkest secrets in front of strangers. Unlike the minimalist Canada and non-existent England and Wales, American voir dire is penetrating and sometimes irrelevantly or haplessly invasive.[264]

Invasive American voir dire is not a recent development. There is a longstanding history of detailed American voir dire, which first departed from the English Common Law tradition by allowing a challenge for partiality based on direct juror interrogation in the 1807 trial of Aaron Burr for treason. "American law retained and expanded the rule to require only that the juror admit the existence of an opinion to support a good cause of challenge."[265]

---

[262]U.S. v. Davila, et al, 704 F.2d 749 (5th Cir., 1983); U.S. v. Doherty, et al, 675 F.Supp. 719 (1987) (Jurors names and addresses were impounded for seven days after the verdict; U.S. v. Harrelson, et al v. El Paso Times, 713 F.2d 1114 (1983).

[263]Journal Publishing Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986).

[264]Paula Hannaford, *Safeguarding Juror Privacy A New Framework for Court Policies and Procedures*, 85 Judicature 18 at N.1. Hannaford argues that background checks into jurors are inappropriate and that some states have banned such activities, noting that the ABA standards on Juror Use and Management decries independent investigation by attorneys of jurors.

[265] R. Blake Brown, *Challenges for Cause, Stand Asides, and Peremptory Challenges in the Nineteenth Century*, 38 Osgoode Hall L.J., 453, at page 472. This is a method distinguished form England where juror partiality was raised in the 19th century through witnesses. *Id.* 462. The article also notes the historical differences, stating "the literature suggests that jury challenges were uncommon in English Courtrooms" between 1200 and 1800 at page 459.

By statute New York State requires prospective jurors to fill out a detailed questionnaire that is given to all parties which may be expanded to suit the specific case. The statute specifically authorizes questions about the juror's place of birth, current address, occupation, prior jury service, knowledge of, relationship to, or contact with the court, any party or attorneys. Both the judge and the attorneys are permitted to voir dire jurors beyond the questionnaire.[266] In capital murder cases, jurors are questioned separately and may be questioned about racial bias.[267] Separate questioning of jurors in other cases is within the sound discretion of the trial judge based on custom and practice.[268] In a serious fraud case recently tried Lord Black's prospective jurors were given a questionnaire to complete even prior to voir dire. (See Annex D)

America trial lawyers will question prospective jurors regarding their income, religious beliefs, where they live, and will even drive by their homes. These actions are regarded as useful windows into the motivations, values and thought process of the jurors. The broad based questioning occurs because the ascertaining of prejudice is not the only objective of voir dire. The prime objective of each American trial lawyer is not to get a fair or neutral jury – it is to get a jury favourable to the attorney's cause.[269] Other aspects of voir dire are designed to determine if the juror is intellectually and emotionally able to serve on that specific case and to make certain the juror does not discover during the proof they know key witnesses.

---

[266] Criminal Procedure Law 270.15.
[267] Criminal Procedure Law 270.15.
[268] Hannaford, *supra* note 264, at 24..
[269] Andrew T. Berry, *Selecting Jurors,* 24 Litigation 8, at pg. 8 (Fall, 1997) "You don't (and shouldn't) really want a fair jury. You want jurors predisposed to your side."

Uniquely American questions are asked during voir dire about prior illegal behavior -- such as have you or any members of your family utilized illegal drugs—a question that could very well violate the juror's Fifth Amendment rights against self incrimination and will likely invite a less than candid response.[270] Such invasiveness prompts juror dishonesty in filling out questionnaires and in responding to questions. Hannaford adroitly quotes a friend asked during voir dire for a drug trial that "he declined to identify himself (as did everyone else on the jury panel) when the Judge asked whether anyone had ever used illegal drugs, 'After all' he explained, I don't know what else they might use the information for. Isn't there still a Fifth Amendment right not to incriminate yourself?"[271]

The question could be circumspect – rather than "have you ever used illegal drugs", the phrase "would your life experience either personally or through family or friends make it difficult for you to be objective in a case involving the alleged illicit sale of drugs" with the express understanding that a positive answer results in the juror being excused.[272]

Narrowly tailored voir dire is regarded as limiting the Defendant's Sixth Amendment the right to trial by jury,[273] yet there is evidence that juror prejudice is not as significant in determining the outcome of cases as the American trial bar postulates. There is

---

[270] Richard Seltzer, Mark A. Venuti and Grace M. Lopes, *Juror Honesty during the Voir Dire*, 19 Crim. Just. 451 (1991). This study found that 25% of the questioned prospective jurors failed to disclose prior criminal victimization by strangers or family members; *see also* Hannaford, *supra* at 24.

[271] Hannaford, *supra* note 264, at 24. *See also* Mary Rose *Expectations of Privacy: Jurors Views of Voir Dire Questions*, 85 Judicature 10 (2001).

[272] The author's experience is that questions of this type can best be asked by questionnaire or in a sequestered voir dire, not in the presence of the rest of the panel – so as to avoid educating other jurors that they can get out of service by answering in the affirmative. *See also*, James W. McElhaney, Trial Notebook, 24 Litigation 55, 56 (Fall, 1997).

[273] James Gobert, Justice Democracy, and the Jury (Brookfield Vt.; Ashgate Publishing Co, 1997).

reasonable documentation that lawyers exercising peremptory challenges frequently strike jurors that are actually favorable to their cause.[274] For example in England and Wales voir dire is virtually non- existent and arguably in favor of the prosecution with the right to ask jurors to stand aside, yet the defense has a far higher acquittal rate than in America,[275] and American jury verdicts enjoy an eighty percent rate of concurrence from the trial judge.[276]

Further buttressing the argument that personal and penetrating voir dire is not only invasive and offensive to jurors, it is generally not meaningful in achieving outcome according to Hannaford who reports that "Social Science research demonstrates repeatedly that the primary factors that influence jury verdicts are evidentiary".[277]

To ensure juror candor during voir dire and to prevent prejudice, a judge in a high profile case pursuant to court order conducted voir dire in two parts:

1) An extensive jury questionnaire completed by all prospective jurors;

2) Questioning of jurors in private with the attorneys with a stenographic transcript redacted of names and other matters released the next day.[278]

---

[274]James W. McElhaney, *Trial Notebook*, 24 Litigation 55, 56 (Fall, 1997)
[275] Penny Darbyshire, *For the New Lord Chancellor – Some Causes for Concern About Magistrates* [1997] Crim. L.R. 681, at 889 reports a 40% acquittal rate in Crown Court; Andrew Ashworth and Michael Redmayne, The Criminal Process, (3d Ed. Oxford University Press, 205) *supra* at 264, report "the Crown Court has a much higher acquittal rate than magistrates courts"; Federal Justice Statistics Data Base 2003 – the acquittal rate in U.S. Federal Courts after a trial by jury is 17%.
[276]William L. Dwyer, In the Hands of the People (Aspen Press, 2002) at 134.
[277]Paula Hannaford, *Safeguarding Juror Privacy*, *supra*, 264.
[278]U.S. v. Stewart, et al., 360 F.3d 90 (2d Cir. 2004); 305 F.Supp2d 368 (SDNY, 2004).

The Appellate Court struck the second part of the order opining that jury selection should be public pursuant to settled law,[279] and that the appropriate remedy was an anonymous jury.[280]

A high profile case with a very complicated fact pattern which included a number of counts of fraud, offers an opportunity to evaluate voir dire where an anonymous jury was empanelled. In the politically charged fraud trial of former Louisiana Governor Edwin W. Edwards and co-defendants, the charges were 34 counts of racketeering (RICO), mail and wire fraud, illegal wiretapping, money laundering and extortion. The indictment specifically alleged that Gov. Edwards and his associates extorted kickbacks from a contractor who was selected to operate a State authorized gambling casino.[281] Governor Edwards had previously been tried on other, unrelated official corruption charges and there were documented attempts to improperly influence the jury, but the efforts were never directly linked to him. The government moved to have the jury empanelled anonymously based on the prior attempts to influence the previous jury. After a hearing on the matter, the trial judge granted the motion based on the attempts in the unrelated prior case against Edwards to interfere with the judicial process, primarily to threaten or bribe witnesses. The trial proceeded with an anonymous jury, however the

[279] Richmond Newspaper Inc. v. Virginia, 448 U.S. 555, 1980, "The right to attend criminal trials is implicit in the First Amendment at 580; Press Enterprise Co. v. Superior Court, 464 U.S.501 (1984). The right to attend a public trial includes voir dire. Waller v. Georgia 467 U.S. 39 (1984) the constitutional right to access may give way to the right of a fair trial or privacy interest of prospective jurors but pursuant to Press Enterprise Co. v. Superior Court *(supra)* the presumption of openness is not easily overcome.

[280] U.S. v. Stewart, *supra* note 278.

[281] U.S. v. Edwards, et al, 442 F.3d 258 (5th Cir. LA. 2006; *cert denied*, 126 S.Ct. 2948, 74 U.S.L.W. 3721 (U.S., June 26, 2006). Edwards and all of this co-defendants but one were convicted. The Court pre-trial granted jurors anonymous status but also withheld the publication of its reasons for anonymity until after the trial, in an attempt to avert prejudice to the defendants.

judge withheld his written decision containing the reasons for an anonymous decision, not releasing the detailed findings until the final verdict was rendered in order to avoid any prejudice to the defendants that the specific reasons set forth in the decision might cause. The court's written decision, released after a verdict of conviction was rendered, granting the anonymous jury for the following reasons: 1) the nature of the crime (official corruption), 2) prior allegations of jury tampering against some of the defendants, 3) the effect of media coverage including the emotional political climate surrounding the trial, and 4) the fact that each defendant faced a lengthy prison sentence and significant fines.

A main argument on appeal was that Edwards and his co-defendants were deprived of a fair trial because of the jury's anonymous status. The Appellate Court affirmed the conviction, rejecting that argument reasoning both that there was a sound basis for ordering an anonymous jury and that the jury questionnaire gave the defendants a great deal of information about the jurors in the Edwards case.[282] A detailed analysis of that questionnaire offers insight into the detailed American voir dire in a complex fraud case.

Prior to the commencement of the voir dire phase of the Edwards' trial, a 116 page questionnaire was mailed to all jurors. The questionnaire encapsulates in writing typical voir dire in an American complex fraud case. Its detail further supports the Appellate rejection of Edwards' claim of prejudice created by anonymity.[283]

---

[282] U.S. v. Edwards, *supra* note 281, *see also* Annex 4, the juror questionnaire utilized by the court in the prosecution of Lord Conrad Black.
[283] *Id.*, at 610 to 624.

For example, the questionnaire asks:

1. Detailed health questions including what medications taken.

2. Home ownership, listing of other places lived.

3. Detailed marital status.

4. Detailed employment history (absent jobs held) including present job satisfaction.

5. Government employment history.

6, Detailed business background.

7. Education (including favorite and least favorite subject) and military background.

8. Detailed questions about the spouse/partner that cohabits with each of the jurors.

9. Civic involvement, including:
   a. Leadership positions held;
   b. Political affiliation;
   c. Political philosophy, extremely liberal, liberal, moderate, conservative, extremely conservative, none of the above.
   d. Political campaigning, contributions and/or participation in campaigns.

10. Religious affiliation, frequency attending church.

11. Attitudes regarding gambling both generally and with regard to the specific laws at issue in the case.

    a. "Do you believe there has been corruption in the awarding of Louisiana 's Riverboat Gaming License? (#69)

12. Specific questions about:

    a. Gov. Edwards
    b. Witnesses who testify about the crime who have been given plea bargaining agreements.

c. Prior trials of Gov. Edwards.

13. Newspapers and magazines read.

14. Knowledge of pretrial publicity and the case.

The details of this voir dire, albeit anonymous, are in marked contrast to the jury selection process in England and Wales where juries are virtually anonymous, and in Canada.[284] It is difficult not to conclude based on range of questions asked in the questionnaire that the lawyers for both sides in the Edwards case received very detailed insight into each prospective juror despite the anonymity.

The debate in America regarding juror privacy and how it balances with the Defendant's 6th, 8th and 14th Amendment rights invites a careful examination of the philosophy and motives which underpin and drive jury selection. As we have seen above, despite all protests to the contrary, the objective of counsel in the American system of jury selection is multi-focal:

1. To eliminate jurors with prejudice against their client;

2. To empanel jurors who will be friendly or favorable to their client;

3. To empanel jurors who will be favorably responsive to the themes and important in the case;

4. To prevent the adversary from empanelling a juror who meets 2 and 3.

5. As a last resort, to empanel a juror who meets1 through 4 and thus, is neutral.[285]

---

[284] See Chapter 9, *infra*.
[285] Andrew T. Berry, *Selecting Jurors*, 24 Litigation 8 (1997).

This must be contrasted with England and Wales, where a 1982 survey found that the majority of barristers felt as a matter of principle that juries should be drawn at random and that they rarely used the right to challenge, quoting one barrister:

> "The jury system is, or in any event is intended to be, as I understand it, a trial by your peers selected at random from all walks of life. And I think it's wrong that a person should try and engineer a better jury for himself, by exercising the right of challenges".[286]

The American voir dire, the absolute opposite of the England/Wales objective of randomness, is a journey to look into the soul of each prospective jury to attempt to discern who they are, what they believe, and to predict how they will vote. Yet research indicates this truly is a poor predictor and that perhaps detailed voir dire is over valued.[287]

D. The Canadian Alternative

The Canadian system of voir dire offers options to both England and Wales and the U.S.A.

In a Canadian Criminal trial voir dire commonly consists of virtually no questioning by the attorneys. The trial judge may inquire regarding health issues, hardship, or relationship with attorneys or parties.[288] Indeed the Canadian philosophy of jury selection in terms of the challenge for cause procedure outlined above is not to determine the

---

[286] Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England and Canada*, 16 Loy. L.A. Int'l & Comp. L.J. 201 (1990-91) at 224 citing Valerie P. Hans and Neil Vidmar in Judging the Jury (New York, Plenium Press, 1986) at 48-49.
[287] Paula Hannaford, *Safeguarding Juror Privacy*, 85 Judicature 18 (201) at 25..
[288] Neil Vidmar, *The Canadian Criminal Jury: Searching for a Middle* Ground, 62 Law and Contemp. Probs. 141, 150 (1999).

juror's personality, beliefs, prejudices, likes or dislikes[289], and is not a fishing expedition to find a favorable or unfavorable juror,[290] it is to determine if the juror is not indifferent.[291]

When a determination is made by the trial judge that a challenge for cause meets the threshold for a hearing to determine juror prejudice, the attorneys are permitted to ask questions of the jurors based on previously submitted written questions which are carefully vetted and markedly contrast with the American voir dire.[292]

A high profile Canadian murder case has received careful analysis by a leading scholar. In the trial of the "Scarborough Rapist", Defendant Paul Bernardo was accused of two counts of first degree murder, kidnapping, unlawful confinement, and aggravated sexual assault, and one count of indignity to a corpse. The questioning of the jurors for cause was limited to eight questions after a brief introduction by the judge to the case, describing to the assembled panel of 980 jurors the nature of the crime, the fact that certain of the evidence would be graphic and gory and the likely duration of the trial would be four months.[293] Ultimately 225 jurors were called in a selection process that took five days, lengthy by Canadian standards. The eight questions asked of prospective jurors were:

1. Have you heard, read, or seen anything about this case in the media newspapers, radio or television)?

---

[289]R. v. Hubbert, *supra* note 49, 289-90.
[290] R v. Sherrat, *supra* note 49; Granger, *supra* note 51 at159.
[291]Canada Criminal Code, S. 640(1) and (2). The notion is that the juror should be indifferent as between the Crown and the defendant.
[292]U.S. v. Edwards, *supra* note 282, for example discussed at length, *supra,* and which contains a detailed jury questionnaire.
[293]Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury* , 79 Judicature 251 (1996).

2. Have you obtained information about it from anywhere else?

3. Have you read, heard or seen anything about the accused, Paul Bernardo's character, background or life style?

4. Have you read, heard or seen anything about Karla Homolka or about her trial?[294]

5. As a result of this case, some groups and organizations have circulated petitions or have sought support concerning issues which relate to this case, the victims, or their families. Have you supported any of these groups or associations, for example, by signing a petition, writing a letter of support, or by making a donation?

6. As a result of any knowledge, discussion, and/or contact with any group or organization, have you formed any opinion abut the guilt or innocence of the accused Paul Bernardo?

7. If you have formed an opinion about the guilt or innocence of the accused, are you able to set aside that opinion and decide this case only on the evidence you hear in the courtroom and the Judge's directions on the law?

8. Answer the following questions with a yes or no:

   Is there anything that we have not asked you about why you could not judge this case fairly and impartially according to the evidence heard at trial and the Judge's directions on the law?[295]

Canadian courts have limited questions in voir dire in other circumstances as well. The general principal is that questions might be designed to learn juror bias but not to learn who the jurors are, meaning what are their positive belief systems and values.[296]

---

[294] Neil Vidmar, *The Canadian Criminal Jury Searching for a Middle Ground*, 62 Law & Contemp. Probs., 142-143. Homolka had been charged arising out of the same crimes. She was Bernardo's wife and an admitted accomplice in certain of the crimes. She received a reduced sentence and was to give evidence against Bernardo as a result of a plea and sentencing trial that received extensive publicity. Hence the question as stated above

[295] Neil Vidmar, *Id,* 144, referencing R. v. Bernardo, Jury Trials (National Judicial Institute, Nov. 27-29, 1995).

The Court in R v. Williams identified four classes of prejudice – interest, specific, generic and conformity.[297]

The narrow Canadian threshold for voir dire with regard to prejudice includes rejection of voir dire regarding:

-strong views regarding sexual assault of children.[298]

-offense based challenges, including elderly abuse, police, spousal abuse, have received mixed results.[299]

-sexual offenses.[300]

-drug cases[301]

-Political beliefs but sometimes allow voir dire depending on the social issue as in abortion.[302]

Canadian voir dire accepts questioning regarding:

-Race (generic)[303]

-Publicity (conformity)[304]

-Aboriginal status (generic)[305]

---

[296]Frank Armstrong, *Jury Selection – Challenge for Cause* (1973) 23 C.R.N.S. 13.
[297] R. v. Williams (1998) 1 S.C.R. 1128, 124 C.C.C.3d 481.
[298] R. v. Find (1998) 131 C.C.C.3d (ONT. CA.) (Jurors are not expected to be indifferent towards crimes.)
[299] David Tanovich, et al, Jury Selection in Criminal Trials, *supra* note 40, at 119-127.

[300] R. v. Bether (1997) 115 C.C.C.(3d) 421 (ONT. CA.) *See also* Tanovich, note 40, at 128-33.
[301] R. v. Hallway (1992) 8 O.R.(3d) 114 C.A.
[302]David Tanovich, et al, *supra* note 40, at135-136.
[303] R. v. Williams, *supra* note 297.
[304] R. v. Zundel (1987) 31 C.CC. (3d) 97 (ONT CA) *leave to appeal* to S.C.C. refused 80 N.R. 317n.; R. v. Keegstra (1991) 63 C.C.C.(3d) 110 (Alter. C.A.) *leave to appeal* to S.C.C. refused 66 C.C.C.2d vi.
[305] R. v. Rogers (2000), 38 C.R. (5th) 331 ONT. S.C.J.

-Sexual preference (generic)[306]
-HIV status (generic)[307]

-Mental challenge (generic)[308]

Canadian jury voir dire should be relevant, succinct, fair,[309] in an attempt to determine the juror's partiality but the questions "must not pry or intrude into individual juror's personal and private lifestyles, antecedents, or experiences".[310] Thus, judges have not permitted questions of jurors as to what race or class of society they are or what organizations the jurors belong to or their fraternization with the race or ethnicity of the Defendant. However, Canadian courts have allowed questions such as:

> -Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged is ...black...?[311]
>
> -Do you have any beliefs or opinions about black men from Jamaica (black Jamaican men) and the commission of crime(s), particularly crimes involving drugs, that would prevent you from judging the evidence in this case, without bias, prejudice, or partiality?[312]

In a departure from the previously indicated desire not to inquire into the jurors personal life, experience, organizational memberships or personal beliefs over and above prejudice, questions were allowed in a case of severe violence against two children. The

---

[306] R. v. Masson (1996) 3 C.R. (5th) 61 (ONT. Gen. Div. Clarke, J; the detailed affidavit of expert witness Neil Vidmar is contained in David Tanovich, et al., *supra* note 40, at page 239.
[307] R. v. Masson, *Id.*, the defendant was a physician.
[308] See David Tanovich, et al., *supra* note 40, at118, 136.
[309] R. v. Zwindel, 1987, 56 C.R. (3d) 1, 31 C.C.C.(3d) 97 (ONT. CA); *leave to appeal* to S.C.C. refused, (1987), 56 C.R.(3d) xxvii, 61 O.R.(2d) 588 (note), 23 O.A.C. 317 (note) (S.C.C.).
[310] Christopher Granger, *supra* note 105 at 177; R. v. Parks (1993) 24 C.R.(4th) 81, 84 C.C.C.(3d) 353, 15 O.R.(3d) 324, 65 O.A.C. 122 (CA); *leave to appeal* to S.C.C. refused (1994), 28 C.R.(4th) 403 (note), 87 C.C.C.(3d) vi (note), 17 O.R.(3d) xvii (note), 72 O.A.C. 159 (note) (S.C.C.).
[311] R. v. Parks, {1993] 84 C.C.C. (3d) 353, 24 C.R. (4th) 81, 15 O.R. (3d) 324, 65 O.A.C. 122 (Can.), *appeal denied*, [1994] 28 C.R. (4th) 402n, 87 C.C.C. (3d) vi, 72 O.A.C. 159n (S.C.C.)
[312] R. v. Morgan (1995) 42 C.R.4th 126 (Ont. Ct. (Gen. Div)); R. v. Kerr (1995) 42 C.R.(4th) 118 (Ont. Ct., Gen. Div.).

questions presented asked the jurors about psycho sexual disorders and what volunteer organizations the juror belongs to that might be relevant to the crime.[313]

Underlying this approach is the Canadian belief in judicial instructions – the existence of a presumption that sound judicial instructions may overcome the jurors' individually held beliefs and that based on those instructions all but the most biased jurors will be able to put aside his/her beliefs and biases and follow the law as given by the judge.[314] In Canada, the judge has an affirmative duty to:

1. Summarize the evidence impartially but substantially review the evidence.
2. Put questions to witnesses to clarify an obscure answer, a misunderstanding, or a relevant omission.

The judge has discretion to:

1. Call witnesses (rarely used);
2. Offer an opinion about the credibility of a witness or the significance of evidence.[315]

The Canadian system therefore offers a toned down version of the American voir dire. The trend in America is to limit voir dire. Many jurisdictions now engage in either judicially conducted voir dire or a combination of judge and lawyer conducted voir dire. In ten United States jurisdictions the judge alone conducts voir dire, in the Federal

---

[313] Christopher Granger, *supra* note 105, at180.

[314] R. v. Sherratt [1991] 1 S.C.R. 509; 122 N.R. 241; 73 Man. R. 161; 63 C.C.C.(3d) 193. L'Heureaux-Dube, J. offered the standard to overcome the presumption. "Thus while there must be an 'air of reality' to the applications, it need not be an "extreme case... The threshold question is not whether the ground of alleged partiality will create such a partiality in a juror, but rather whether it could create that partiality which would prevent a juror from being indifferent s to the result. In the end, there must exist a realistic potential for the existence of partiality on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed". Note 10 at pp. 535-536 S.C.R.; pp. 211-212 C.C.C. If the Court finds this potential for bias then a mini trial as to bias proceeds before a mini jury pursuant to the procedure described at 24, Criminal Code 638(1)(b) to (f).

[315] Neil Vidmar, The Canadian Criminal Jury: Searching for a Middle Ground, 62 Law & Contemp. Probs. 141, 144-145.150 (1999).

System and thirty-six states have a shared voir dire between the attorneys and the judge. Only four states require exclusively attorney voir dire.[316]

E. Experts In the Jury Room

Expanding the jury pool by eliminating occupational exemptions from jury service poses new risks to jury deliberations, possibly remedied only by voir dire.

In the present environment when experts become jurors, i.e. physicians, lawyers, police, etc., the prospective juror in America is frequently asked during vior dire whether or not they can put their special knowledge aside and in essence not become an expert in the jury box. The Auld Report recommended and Parliament adopted in the Criminal Justice Act 2003 a modification of the English standards for juror eligibility, creating a system which requires physicians, lawyers, police, employees of lawyers to be called for jury duty. English reliance on random selection could pose a problem as there exists no real opportunity for voir dire on the issue of expert in the box, that is a juror with special expertise or training becomes an expert witness who guides the jury offering opinions without being subject to the rules of evidence or cross examination.[317] American Courts take succor in the opportunity provided by voir dire to cull out unsworn experts in the jury box. Thus when a party in a U.S. case allows a juror with a background in criminal justice to sit on a case, a motion for a new trial because of possible prejudice was denied, the judge holding that the juror's sharing with other juror's expertise on the appellate and criminal law process should have been expected when the juror's background was

[316] U.S. Dept. of Justice, Bureau of Justice Statistics, State Court Organization, 1998, 273-276.
[317] Criminal Justice Act 2003, §321, abolishing categories of previous excused from jury services including doctors, lawyers, police officers, etc.

revealed during voir dire. The act of accepting that juror was in the court's view an implied waiver of any use by the juror of his/her training.[318]

There is some longstanding instruction in the common law because for years American jurisdictions including New York, have not excluded registered nurses from jury duty as a result of their professional standing and knowledge. Consequently, nurses as jurors have provoked reversal and the ordering of a new trial where they have in juror deliberations substituted their own professional opinions in place of expert proofs at trial and shared their opinions as part of deliberations.[319] A lawyer who was an administrative law judge was dismissed from a jury when he acknowledged that he was second guessing the trial judge's rulings and the legal soundness of objections, thereby indicating an inability to follow the judge's legal instructions.[320]

Unexplored by any meaningful study is the effect of placing previously excluded experts on juries – lawyers, doctors, police, etc. There is anecdotal data, such as a case where a juror law student instructed his fellow jurors on the legal standard during deliberations.[321] In Chapters 8 and 9 questions posed to American judges and lawyers and English judges will provide their concerns about this issue.

In another twist on the presence of expert jurors, a court held that where a juror indicated reliance on professional training in deliberations by affidavit, a hearing was not required and the verdict was affirmed because the juror's use of professional expertise merely

---

[318] Fullwood v. Lee, 290 F.3d. 663, 683-684 (4th Cir., 2002).
[319] People v. Maragh, 94 N.Y.2d 569 (2000); *See also*, People v. Arnold, 96 N.Y.2d 358 (2001).
[320] People v. Cherry, 188 Misc.2d 799 (2001).
[321] Steven Brill, *Inside the Jury Room at the Washington Post Libel Trial*, Am. Law, Nov. 1982, at 1.

confirmed the medical proof at trial, it was not communicated to other jurors, and did not violate defendant's right to have the case decided on the evidence adduced.[322] The Federal Courts have held that jurors discussing their personal experiences with sexual harassment, and sensitivity training they received in their employment was in the nature of personal experience or common knowledge and thus not a basis to set aside the verdict.[323]

V. Conclusion—The Shadow of Lord Mansfield

It is tempting to argue that time has over taken Lord Mansfield 's rule and that present reality creates new circumstances which call out for greater adjudicative access to the jury's intrinsic and internal deliberations. As we have seen, the greater press/media scrutiny of modern trials, coupled with the sensationalism, post-trial interviews of jurors and the prospect of juror book deals, all suggest that a rule that was created in the mid-18th century must be ripe for reconsideration. The all white, all male, landed jurors of Lord Mansfield's day have been replaced by far more diverse contemporary juries.

The hubbub surrounding juries today points to a fundamental flaw in the rule – it treats jurors by a different standard than the judge and thus allows actions by jurors during deliberation to go unchallenged -- actions which if engaged in by the judge would constitute reversible error. The U.S.A., England and Wales, and Canada have all devised statutes which follow the rule and protect the intrinsic deliberations of juries to varying degrees. However, it has been observed that "in the United States, the issue of impeachment has not been distorted by Lord Mansfield's evidentiary ruling to the extent

---

[322]People v. Camacho, 293 A.D.2d 876 (3rd Dept., 2002).
[323]Rahn v. Junction City Foundry, Inc., 161 F.Supp.2d 1219, 1247 (D. Kan. 2001).

that it has in England and Canada."[324] The Auld report notes that the English version has caused the Court of Appeal to engage in legal gymnastics:

> "The jurisprudence of the Court, in its laudable attempt to overcome the unduly restrictive prohibition in Section 8 of the 1981 Act, is logically hard to justify. It will not enquire into what jurors have done or said in the course of their deliberations in the jury room, but it will do if they are elsewhere, say while in a hotel overnight. In my view, the effective bar that Section 8 puts on an Appellate Court inquiring into and remedying possible bias or other impropriety in the course of their deliberations is indefensible and capable of causing serious injustice."[325]

The Auld report proposed a modification of Section 8 of the Contempt of Court Act "to permit, where appropriate, inquiry by the trial judge and/or the Court of Appeal (Criminal Division) into alleged impropriety by a jury, whether in the course of its deliberations or otherwise".[326]

The Auld report does not specify the exact nature of the misconduct apart from a specific reference to racism. We can infer that a Ouija board, drawing lots and a general failure to deliberate fall within the categories of misconduct. What, however, about a perverse verdict, a misunderstanding of the law or a verdict which nullifies the law?

Of course, Lord Steyn in R. v. Mirza offered the dissenting opinion that the Court of Appeal did have the power to order an inquiry where there had been a breach by jurors of their oath despite the provisions of Section 8 of the Contempt of Court Act.

---

[324] Anisman and Linden, *supra* note 218, pg 365.
[325] Auld Report, *supra* note 16, Chapter 5, ¶98.
[326] *Id.*

The standard identified by Lord Steyn – breach of oath – is worthy of consideration and analysis for all jurisdictions. A verdict based on racist deliberations, or having failed to properly weigh or evaluate evidence as in the Ouija board or rolling of dice cases – arguably breaches the oath of the juror, unlike a perverse or nullifying verdict. In that event, should each jurisdiction provide both sides the right to review deliberation, or is such a verdict, given the jury's role as a trier of fact, well within the jury's sound discretion?

Sean Enright argues that the case for the repeal or amendment of the non-disclosure rule repeal is not just a means of assessing the workings of a jury trial but also is a means of curing gross miscarriages of justice.[327]

Minimal voir dire regarding prejudice specific to the immediate trial and the specific parties before empanelling a jury would provide some prophylaxis against the miscarriages that the rule presently allows, prejudice that looms larger as random juries include experts in the jury box in a far more socially diverse America, Canada, and England and Wales than Lord Mansfield could have ever imagined.

Limiting America's talking jurors to expressing only their view and prohibiting disclosure of the opinions expressed by others in the jury room also makes sense.

The United States Supreme Court allowed that testimony by a juror about a verdict in some instances could not be excluded without "violating the plain principals of justice".[328]

---

[327]Sean Enright, *Unlocking the Jury Room*, [1989] 139 New Law Journal, 655.
[328] McDonald v. Pless, *supra* note 122, at 268-269.

This view is the minority view in England and Wales and Canada, as articulated by Lord Steyn and Judge Finlayson. The proper remedy is to allow juror comment about their own perceptions or thought process, but to prohibit discussion of the specifics of deliberations or comments by other jurors during deliberations, except to report perceived breaches of the jurors oath.

CHAPTER 3

EXTRA-EVIDENTIARY INFLUENCES ON CAPITAL SENTENCING OUTCOMES AND OTHER COMPLEX CASES – JURY CHARGES, JURY CONFUSION, RACE AND PUBLIC OPINION

I. Introduction

Some have defined the jury as "the conscience of the community" which provides independent verdicts free of the ordinary political influences.[329] Others, discussed throughout this work, view juries as unable to cope with the modern complex trial, vulnerable due to a number of alleged infirmities that will be examined in other chapters. In this chapter the claim that jury verdicts can be impacted by extra evidentiary influences is examined in the most studied and evaluated form of complex jury trial, the capital murder case as well as serious fraud cases.

The existence of improper extra evidentiary influences such as coercion, speculation, confusion, racism, politics, religion, and intra-deliberative bullying raise serious questions regarding the ability of jurors and judges to fairly resolve criminal cases, despite the tremendous intellectual energy which has been expended attempting to achieve verdicts unfettered by outside influences. Capital cases have received extensive scrutiny. For that reason, any analysis of jury and judicial function including outcomes in criminal cases must include the capital jury. Indeed capital juries fall squarely within any definition of complexity because of the complex statutory law that juries must apply to the facts as well

[329] Sally Lloyd-Bostock and Cheryl Thomas, *The Continuing Decline of the English Jury*, 53 F.N.4; Neil Vidmar, World Jury Systems (New York: Oxford U. Press, 2000) quoting M.D.A. Freeman, *The Jury on Trial* (1981) 34 Current Legal Probs 65.

as the very nature of the subject matter of the trial which determines life or death with regard to the defendant.

Do extra evidentiary influences impact trial outcomes? Is the existence of these factors rampant or rare? According to some commentators and appellate courts, a coerced verdict or sentence, or a verdict, motivated by factors outside of the law and the facts applicable to the case, rendered by either judge or jury, occurs on an ongoing basis in capital trials despite the fact that a casual observer might assume that the American system would take the most care and achieve the most fair and accurate verdicts in capital cases. While the concerns are magnified in capital cases, many of the same issues and concerns raised about juries in capital cases arise in white collar fraud and other criminal cases. Indeed, issues of juror competence, pre-existing bias, impact of publicity and public opinion and capacity to comprehend complicated proof and judicial instructions arise to some degree in all criminal trials. Because of American constitutional requirements, all felony crimes are treated in like manner (except for capital sentencing where the jury is required to find aggravating and mitigating factors which will be further discussed below) but the heightened scrutiny requirement imposed by the U.S. Supreme Court in capital cases also make capital case jury deliberations an important starting point.[330]

The Sixth Amendment to the U.S. Constitution grants "the accused...the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have

[330]Barefoot v. Estelle, 463 U.S. 880 (1983). The Court noted at p. 888 "... unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires rhetorical or re-sentencing as certainly and swiftly as orderly procedures will permit."

been committed..."[331] The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment (which has been the basis for the U.S. Supreme Court to impose a heightened scrutiny standard on capital cases) and the Fourteenth Amendment applies federal due process to the States.[332] The interplay and interpretation of these three amendments has formed the foundation for the judicial and academic discourse regarding capital outcomes. The Supreme Court has held that the defendant in a capital case is entitled to have a jury determine not just guilt or innocence, but also any aggravating or mitigating factors which apply to the imposition of a capital sentence. Thus all but the actual capital sentence must be determined by the jury.[333]

There are recurrent areas of alleged inappropriate external influences. According to some authorities, capital jurors are subject to coercion in the actual trial during jury selection, because of the contents of certain judicially rendered jury charges during jury deliberations, and as a result of interaction, behaviours, and certain generalized misunderstandings and misconceptions that are a part of the common knowledge of the venire. Capital punishment and the distinctively American jury selection process offers students of comparative law a valuable opportunity to study jury function in deciding life or death, the ultimate jury issue, utilizing for that analysis the process followed by juries carefully questioned and selected by both the prosecution and defense (often taking weeks to choose a jury). How jurors are vetted for prejudice, suitability and other factors function in capital cases may be

[331] Does LaValle encroach upon the legislative constitutional prerogative by preventing the legislature from determining that a defendant by choice or default may receive death, LWOP, or regular life, a sentence that allows for the possibility of parole? That is not the issue considered in this work, although the limitations imposed by the court in LaValle certainly provide severe restrictions on the information presented to the jury.

[332] U.S. Const Amend. VIII; U.S. Const Amend. XIV.
[333] Ring v. Arizona, 536 U.S. 584 (2002).

instructive regarding the value of voir dire and the overall ability of jurors to competently decide such complex cases.

Another school of thought holds that elected judges also are subject to extra evidentiary influence or coercion because they are captives of public opinion, with some literature arguing that elected judges, and particularly judges in State courts, are more likely to preside over death penalty verdicts than judges who are appointed. Others contend that appointment and/or ambition to be appointed to a higher court impact upon judicially determined outcomes. Given the interest in expanding the role of judges as triers of fact in many jurisdictions in North America and England and Wales, the conduct of the judiciary in the cauldron of capital cases may also be instructive. Other factors alleged to affect capital outcomes include: public opinion, the very act of selecting a capital jury, the politics of judicial selection and retention, and race.

This chapter will attempt to examine each specific extra-evidentiary influence on capital sentencing outcomes in an effort to discern whether the criticisms launched at judges and juries (frequently from both ends of the political spectrum) are fair. Chapter 2 has explored juror rights and privacy issues. Interwoven with those issues are contrasting laws of the United States and the United Kingdom which attempt to protect juries from the litigants post-verdict from going behind the verdict in a legal second guessing of jury decision making. Both jurisdictions have limited legal mechanisms which can cull out after the fact any extra evidentiary factors that might have influenced the verdict. We will review the conduct of judges and jurors, evaluate the limitations placed on juries by decisional law,

analyzing whether the limitations result in jury speculation and inferences which may undercut the integrity of the process and affect the outcome of capital jury verdicts.

II. Jury Coercion Defined

When Chief Justice Vaughn in Bushells' case held that juries could not be punished for their actual or contemplated verdicts, that ruling was the precursor of the post-modern era which accords juries more favored treatment pursuant to statute as well as custom and practice.[334] Even after Chief Justice Vaughn's pronouncement, juries experienced another two-hundred plus years of abuse at the hands of the courts. Under ancient common law, jurors were kept together by the court until they had agreed upon their verdict.[335] Coerced verdicts were viewed as proper and appropriate. Blackstone's Commentaries sanctioned the holding of jurors without food and drink until there was unanimous agreement, as well as that a deadlocked jury may be taken by the judge with him to his next venue in a cart rather than wait for them.[336]

In the 18th and 19th centuries, the concept of the jury as hostage became more controversial. Justice Kent referred to this treatment of jurors as a "monstrous doctrine", decrying also the carting of jurors from "one assize to another".[337]

During the 19th century as these practices became more discredited, appellate courts commenced overturning verdicts where the trial court failed to provide jurors with proper

---

[334] Douglas Smith, *The Historical and Constitutional Contents of Jury Reform*, 25 Hofstra L. Rev. 440-441 (1996).
[335] Thompson and Merriam on Juries, 2310 (1884).
[336] *Id.*
[337] People v. Olcott, 2 Johnson's Cases 301 (N.Y. Sup. Ct. 1801).

accommodations during prolonged deliberations or exhorted or browbeat deadlocked juries into a verdict.[338]

Jury coercion was defined elegantly in Ingersol v. Lansing

> "Every attempt to drive men into an agreement which they would not have reached freely is a perversion of justice".[339]

There was expansion upon that definition in State v. Bybee:

> "No juror should be induced to agree to a verdict by a fear that a failure to so agree would be reflecting upon either his intelligence or his integrity. Personal consideration should never be permitted to influence his conclusions and the thought of them should never be presented as a motive for action."[340]

While an all encompassing definition of "jury coercion" is elusive, jury coercion which may occur as a result of :

1. the language of a statute,
2. a jury charge,
3. a general belief fueled by non-evidential hearsay,

[338]A sampling of the case law at this time includes the following: Failure to agree was an imputation on Judge and jury. State v. Bybee, 17 Kansas 462 (1877); jury locked up not allowing dinner, Hancock v. Elam, 62 Tenn 33, 3 Baxt. 33 (Sup.Ct. 1873). A message sent by the Judge to the deliberating jury that he would take the jury to next town with him if the deadlock continues, Spearman v. Wilson, 44 Ga. 473 (Sup. Ct. 1871); days of deliberation in the courthouse, the judge warning he will leave and come back in two days if they do not decide by nightfall, Ingersoll v. Town of Lansing, 51 Hun 101 (1889); for 4 days the jury is out (four days and four nights) without cots or beds sleeping in the Courthouse, the judge advises the jury a deadlock is an admission of incompetency, People v. Sheldon, 156 N.Y. 268 (1898).

[339] Ingersol v. Lansing, 51 Hun. 101, 103 (1889).
[340] State v. Bybee, 17 Kan. 462 (1877).

4. racial prejudice, and
5. intra jury deliberative behaviour.

Therefore, jury coercion is defined in this thesis as an improper extra evidentiary influence on the jury's decision making, to be distinguished from the jurors using common sense, life experience and moral beliefs in their analysis of the facts according to the judge's instruction.

The notion of extra evidentiary influence is also vague, but it is a major underlying premise for the American system of voir dire – the means or process by which jurors are questioned to determine whether or not prejudice exists and through which the jury is selected because the system of voir dire exists to determine whether or not jurors will be effected by external influences like unique knowledge of the case or prejudice.[341] As we will see, there are some who believe that the very process creates prejudice.

III. Statutory Language and Jury Instructions: The People v. LaValle expansion of the definition of jury coercion.

In a leading ruling regarding jury coercion, People v. LaValle, the New York State Court of Appeals by a 4-3 vote struck down New York's death penalty statute as violative of the due process clause of the New York State Constitution.[342] By virtue of this decision, the majority of that court greatly expanded the definition of jury coercion as it is applied in the

[341] Nancy Jean King, *The American Criminal Jury,* 62 Law and Contemp. Probs. 41(1999), 53-59.

[342] People v. LaValle, 3 NY3d 88 (2004). People v. LaValle is the third capital case in which the Court reversed a death sentence since the adoption of the death penalty statute in 1995. The prior two decisions were rendered overturning death verdicts without declaring the statute unconstitutional. *See* People v. Cahill 2 N.Y.3d 14 (2003), and People v. Mateo, 2 N.Y.3d 383 (2004).

U.S. The LaValle majority reasoned that because the statute compelled the trial judge to advise the jury in his/her charge that if the jury could not reach a unanimous verdict of either death or life without parole (LWOP) in the penalty phase of the trial, then the Judge would sentence the Defendant to 20-25 years to life with a chance of parole (regular life sentence).[343] The Court further held that the statute must require a charge that will advise the jury of deadlock consequences, but that the statutory charge before them was coercive and thus unconstitutional. This is true in England and Wales, as well as, where majority verdicts are permitted. Juries are not advised of the possibility of a majority verdict until they have deliberated for an extended period of time.[344]

The New York death penalty statute is unique in that it advises the jury of the possibility of parole in the event of deadlock as a part of the judge's original charge to the jury without according the jury an actual vote on that sentence as an option. Ordinarily a deadlock instruction of any type is not given in the initial judicial charge to the jury but is administered only if the jury after deliberation declares impasse. The majority of the Court of Appeals in LaValle reasoned that advising jurors that impasse would result in a sentence that included the possibility of parole was a coercive influence because jurors may surrender their honestly held beliefs when deliberating on the death penalty to avoid the future release of the offender occasioned by deadlock.

---

[343] The New York death penalty is codified at Penal Law 125.27, (McKinneys 1995). It requires the jury to determine the sentence. The section which provides for the "deadlock charge" is as follows and is contained at: Criminal Procedure Law §400.27 Vol. 11A, 146 (Pocket Part) (McKinneys 1995):

> "The Court must also instruct the jury that in the event the jury fails to reach a unanimous agreement with respect to the sentence the Court will sentence the defendant to a term of imprisonment with a minimum term of between 20 and 25 years and a maximum term of life."

[344] Author interview with nine England and Wales judges set forth in Chapter 9.

The New York death penalty law is also the only American capital punishment statute that requires the court to instruct the jury that deadlock will result in a lesser sentence. Three other states, Missouri, New Jersey, and Oregon authorize the judge to give a lesser sentence in the event of deadlock – but "is one of the alternatives that the jury considers during deliberations".[345]

The majority of the New York Court of Appeals concluded that the State Legislature was seeking to influence jury outcomes by advising the jury that a failure to impose a sentence of death would make the convicted defendant some day eligible for parole, thus in LaValle the majority reasoned as follows in finding the statute to be coercive:

> "...the jurors in a capital case are given instructions that may coerce them into surrendering their conscientious beliefs. The fear in this case was not that the juror would be deprived of meals or rest, or that failure to agree would have wasted everyone's time. Rather, the motivating fear in the minds of a juror in a numerical minority is likely to be that a vote for life without the possibility of parole is really a vote for life with the possibility of parole.[346]
>
> . . .

The court continued:

> "Thus, if there is one lone juror who truly believes that the death sentence is not warranted, then a non-death sentence must be imposed. (See CPL 400.27 [11] [a]) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor(s) substantially outweigh the mitigating factor(s) established, if any, and unanimously determines that the penalty of death should be applied.'[347]

---

[345] Laurie B. Berberich, *Jury Instructions Regarding Deadlock in Capital Sentencing,* 29 Hofstra L. Rev. 1301; 1326 (2001).
[346] People v. LaValle, *supra* note 342, *at* 126.
[347] People v. LaValle, *supra* note 342, at 126-127.

This holding is squarely contrary to two existing schools of thought, which will be more fully explained below:

A. Capital case jurors are entitled to disclosure of the likely consequences of deadlock so that they do not speculate. Later in this chapter below the advantages and risks of full disclosure to juries of legal options are discussed.

B. Coercion is conduct by language or physical activity that mandates a verdict. LaValle's holding that giving jurors sentencing choices creates a coercive decision making process is analyzed in the context of research about jury speculation. This chapter also provides a review of the research about jury decision making recognizing that in capital cases incapacitation is important to jurors – a reality LaValle avoids.

A. What Should the Jury Know and When Should They Know It?

While they would applaud the result, the reasoning in the LaValle decision violates the long held arguments of many leading death penalty opponents, including Bowers and Steiner, who assert:

> "If you were a juror on a capital case, wouldn't you want to know what the punishment would be if you did not vote for the death penalty? Wouldn't you want to know how soon such defendants, not given the death penalty, become eligible for parole or how soon they usually are paroled? Wouldn't you want to know whether you and your fellow jurors could impose a sentence of life without the possibility of parole? Wouldn't you want to have that option if you were asked to decide who should live or die?"[348]

From Bowers and Steiner's review of 280 death case transcripts, in 25 percent of the cases examined the jurors ask questions about parole and following the judge's response, the jury typically returns a verdict of death. "This suggests that parole concerns may often be the critical last issue upon which a decision for life or death depends". [349]

Decisions and studies in the last twenty years have also suggested that capital jurors are deeply interested in whether or not the defendant is eligible for parole[350] For example, Hood proposed a model instruction for Virginia jurors that advised the jury: "Under the Laws of the Commonwealth of Virginia, any person sentenced to life imprisonment for capital murder is eligible for parole after 25 years". Hood's proposed instruction gives the jury a full recitation of the Defendants' rights regarding time off for good behavior as well. The Hood proposal is included in the National Legal Research Group's December 1988

---

[348] William J. Bowers & Benjamin Steiner, *Death By Default, An Empirical Demonstration of False and Forced Choices in Capital Sentencing,* 77 Tex. L. Rev. 605; at 677-678. Bowers and Steiner cite Justice John Paul Stevens in Brown v. Texas, 118 S. Ct. 355 (1997) who argues for jurors being told of parole eligibility in capital cases, utilizing "citizen surveys in a number of states that indicate(s) people find the death penalty less attractive the longer offenders would stay in prison before becoming eligible for parole..." at page 609.

[349] *Id.,* at 629. To further make the point, Bowers and Steiner state at page 610 "Although the assumption that jurors disregard parole in their decision-making has undergirded the thinking of the Courts about how jurors should make capital sentencing decisions, the empirical data shows it is a false description of what jurors actually do – a legal fiction".

[350] Pope v. State, 45 S.E.2d 831 (GA 1986); Anthony Paduano and Clive A. Stafford Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty.* 18 Colum Hum Rts. L. Rev. 211 at 221-23 (1987); Turner v. Commonwealth 364 S.E.2d 483 (VA 1988).

"Report on Jurors Attitudes Concerning the Death Penalty". Hood reports that jurors would disregard an instruction not to consider parole, that their belief was that a life sentence would actually translate into ten (10) years served, that the amount of time served was important to sentencing and that they would be significantly influenced by disclosure of the mandatory minimum.[351]

Paduano and Smith concluded that if jurors were assured in the sentencing instructions that if a person was sentenced to LWOP, they would serve at least twenty years, two-thirds of the jurors responding indicated that they would reject a death sentence and would be more likely to sentence the Defendant to life in prison.[352] The studies cited above found that without specific instructions, jurors were likely to infer that LWOP would result in a prison term with parole, thereby influencing jurors in sentencing to vote for the death penalty to incapacitate the Defendant.

The United States Supreme Court has acknowledged that the false suggestion of parole eligibility in a capital case when in fact the Defendant is not eligible for parole can be coercive, reasoning in Simmons v. South Carolina that the Defendant was entitled to have the jury advised of non-parole eligibility only when the State makes future dangerousness an issue and the only alternative to death sentence is LWOP. The State argued for Simmons' execution asserting his predatory history toward women. The U.S. Supreme Court held that the Defendant should be allowed to argue that he was parole ineligible reasoning that "the State may not create a false dilemma" by arguing the Defendant is

---

[351] William W. Hood, III. *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989) at 1624.
[352] Paduano and Smith, *supra* note 350.

dangerous when if convicted and given LWOP he is not a danger to the public. [353] The Court apparently did not embrace the raising of straw men during the trial, but fails to offer insight regarding how to deal with jury speculation about the length of sentence.

On the other hand, instructions similar to the LaValle instruction have been found by the U.S. Supreme Court to not violate the due process clause of the United States Constitution. For example, in California v. Ramos, the U.S. Supreme Court upheld a California Jury instruction which advised jurors in a capital case that the Defendant would be eligible for commutation by the Governor even though given a sentence of LWOP.[354] Thereafter, the California Supreme Court declared that instruction unconstitutional on State Constitutional grounds in People v. Ramos relying on reasoning used by the New Jersey Supreme Court in State v. White.[355]

At issue in People v. Ramos was a California jury instruction which advised the jury that if LWOP was given that the governor may commute the sentence. The charge did not advise the jury that the Governor had the right to also commute a death sentence. The Court found that permitting the jury to consider a pardon or commutation was extraneous and thus violative of the due process clause of the California State Constitution. In State v. White the jury asked the Court during capital murder deliberations if the defendant was given LWOP if parole was possible. The trial court advised the jury it was, reading the

[353] Simmons v. South Carolina, 512 U.S. 154 (1994).
[354] California v. Ramos, 463 U.S. 992 (1983) at 1026-27. The Court notes that 25 states refuse to instruct juries in capital cases regarding parole, believing it is not a valid issue for the jury to consider.
[355] People v. Ramos, 689 P.2d 430 (Cal. 1994); State v. White, 142 A.2d 65 at 76 (NJ, 1997).

statute to the jury. The New Jersey Supreme Court reversed, faulting the charge by omitting an admonition to the jury that "parole was not relevant to the deliberation".[356]

In People v. LaValle the court relied in part on the reasoning of other state courts by following People v. Ramos, supra, and White, supra, and rejecting the United States Supreme Court's analysis in California v. Ramos, supra, and in Jones v. U.S., supra.[357] In Jones v. U.S., the U.S. Supreme Court held that "the Eighth Amendment does not require that the jury be instructed as to the consequence of their failure to agree." The defendant in Jones requested an instruction which would have advised the jury that LWOP was the sentence the Defendant would receive in the event of deadlock on the death penalty. The Supreme Court reasoned that the instruction requested was contrary to the State's interest in having jury unanimity and was not essential for the jury to determine the Defendant's sentence regarding death.

The LaValle holding offers a major twist from Jones regarding jury knowledge and awareness because of its finding that jury knowledge of a sentence that includes the possibility of parole as a consequence of deadlock is coercive. LaValle also expands the New Jersey and California Courts analysis in finding coercion based on the New York charge, rather than a failure to provide a legally sufficient charge of the jury need to not consider parole, as stated in State v. White.[358]

---

[356] State of New Jersey v. White, 142 A.2d 65 at 76 (NJ, 1997).
[357] People v. LaValle, *supra* note 342, at note 14, People v. Ramos, *supra* note 354, 27. State v. White, *supra* note 355, at note 28. California v. Ramos, *supra* note 354, . Jones v. US, 527 U.S. 373 (1999).
[358] People v. LaValle, *supra* note 342; California v. Ramos, *supra* note 354; State v. White, *supra* note 355.

B. Is Giving Jurors Honest Information About Choices Coercive? Interviews with Death Penalty Jurors

The LaValle case uniquely reasons that the New York State Legislature coerced capital juries by providing that the jury must be advised that a jury deadlock on death or LWOP will result in a statutorily mandated sentence "regular life" (a life sentence with the chance of parole after twenty-five years). LaValle's holding clearly limits legislative options. One wonders under the LaValle reasoning, if the jury could constitutionally be given the choice of an actual vote on options of death, LWOP, and regular life, but what then would be the deadlock consequence? A possible option is to allow the judge to sentence in the event of deadlock. Pursuant to Ring v. Arizona, such an arrangement would not violate the Sixth Amendment of the U.S. Constitution so long as the jurors rendered a verdict on the aggravating factors and mitigating factors to be used by the sentencing judge. [359] Another possible approach would be the empanelment of a new jury to determine sentencing. Such an approach would have a cost in terms of economics as well as upon the emotions of the victim's families and the fact witnesses.

Taken to its logical extension, LaValle appears to hold that giving the jury full disclosure about a lesser verdict in a deadlock situation is coercive. Assume the death penalty was abolished in New York and the jury could give as a maximum punishment LWOP: would advising the jury that a regular life sentence or some other lesser sentence was the deadlock consequence be coercive? Certainly Bowers and Steiner would maintain based on their research that the full knowledge of all permutations of a verdict and sentence is not coercive and rather would give the jury a complete look at the alternatives so that they

[359] Ring v. Arizona, 536 U.S. 584 (2002); U.S. Const. Amend. VI.

could make a knowing judgment. [360] Just because a juror might conclude that a minimum sentence of 25 years is too little based on a calculation of the defendant's age in twenty-five years, because he might still commit havoc upon release and thus opts for LWOP – is that a coerced thought process? And as we will see below, jurors consider future dangerousness and deeply doubt the truthfulness of LWOP. Having a lesser alternative before the jury may well give credibility to LWOP.

The LaValle decision is also curious in that the majority cites favorably Bowers and Steiner but the finding is contrary to their main contention that jurors will speculate about the possibility of parole, not believing that LWOP actually means a lifetime of incarceration thereby making the choice of death or LWOP unbelievable. Most states with the death penalty now provide LWOP as a sentencing option and in most of these states jurors are expressly informed of this option, though very few jurors believe that LWOP is the punishment usually served by those not given death.[361]

Based on this conclusion, Bowers and Steiner argue that jurors should receive a candid and panoramic view of the sentencing options so that the ultimate decision is not reached because of speculation. The LaValle majority instead crafts for the jury an astigmatic view of those options, thereby inviting the very speculation that Bowers and Steiner eschew. Liebman also argues that the failure of trial courts to clue jurors on the minimum number of years that must be served for LWOP has a disastrous result. "These beliefs again led jurors to vote for death".[362] By contrast, the statute which the LaValle majority declared

---

[360] William J. Bowers & Benjamin Steiner, *Death By Default, An Empirical Demonstration of False and Forced Choices in Capital Sentencing,* 77 Tex. L. Rev. 605; at 677-678.
[361] *Id.*, at 708.
[362] James S. Liebman, *The Overproduction of Death,* 100 Colum. L. Rev. 2030, 2117 (2000).

unconstitutional actually gives jurors a clear notice that a default would result in a regular life, eliminating jury speculation about when LWOP would be triggered and conveying by comparison that it truly is a life sentence.

According to Garvey, capital jurors find that the most significant aggravating factors in a death penalty verdict are the brutality of the crime, the existence of a child victim, future dangerousness and lack of remorse.[363] Given the foregoing, it is not surprising that jurors would be deeply concerned about the duration of the sentence. It is unreasonable to ask jurors to contemplate sentencing an individual without providing all available options which may occur by law because a lack of disclosure invites speculation, particularly when there is usually a limited constellation of options available to juries in capital cases – death, LWOP, or regular life. Depending on the nature of the crime (brutality), the defendant's conduct in the Courtroom (remorse), other aggravating factors such as relevant criminal record, and (where included as an aggravating factor) future dangerousness, the jury will logically be concerned not only about the defendant's long term legal prognosis, but also the risk he poses if paroled. Uncertainty about the actual period of incarceration can convert the death penalty deliberation from a primarily retributive result to disproportionate emphasis on achieving an incapacitative sentence. It is therefore likely that when jurors believe a defendant is a future danger, that death may be the preferred incapacitative sentence because there is uncertainty about the actual integrity of LWOP. The advantage of placing the three options – death, LWOP and regular life before the jury is that they are a rational and logical array of options. The jury is presented a full picture of the statutory

[363] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think,* 98 Colum L. Rev. 1538 (1998).

menu of sentences available which meet rational sentencing possibilities and diminish speculation.

As noted above, major contemporary jury studies yield findings which inferentially suggest that the LaValle Majority's expansion of the traditional notion of jury coercion (from physical hardship, such as keeping a jury that is deadlocked without food or long hours or in an unattractive setting, or a specific judicial charge that suggested a result) to a statutory coercion by jury charge is counter-intuitive and unrealistic. The data from the studies cited above suggest that some jurors will not believe that LWOP is in fact, life, and that said jurors will be concerned that LWOP is not either retributive or incapacitative thereby inducing those jurors to vote for death. Therefore, an unanticipated consequence of LaValle may very well be further speculation with the death penalty as an incapacitative result. The mere charge that deadlock will result in LWOP (which is the only logical deadlock charge in the wake of LaValle) will be greeted with disbelief.

Our interviews with several of the jurors in two capital punishment cases, resulting in a death verdict (People v. Cahill) and resulting in a LWOP verdict (People v.Owens)suggest that the very explanation of regular life as the consequence of deadlock reassured the jurors that LWOP is in fact for life. [364] The six jurors interviewed were actual recipients of the deadlock instruction that was declared unconstitutional in LaValle. The jurors believed that LWOP was in fact that and accepted that if LWOP was given that the Defendant would never be eligible for parole. While a tiny sample, these findings are inconsistent with the

[364] People v. Cahill, 2 N.Y.3d 14 (Ct. App. 2003); People v. Owens, 188 Misc.2d 392 (2001); Catherine Kohler Riessman, Narrative Analysis, (Sage Publications, 1993).

findings of Bowers and Steiner.[365] One possible explanation for the difference is the notion that giving the jury the full spectrum of options – death, LWOP, or 25 years with possibility of parole, diminishes suspicion about the integrity that LWOP is truly an incapacitative sentence for the life of the offender. The jurors interviewed reported that as a part of their sentencing deliberations they agreed that resorting to deadlock was unacceptable, and that regular life was not a desirable result. Each juror agreed therefore that achieving a unanimous verdict was their highest priority based upon their evaluation that the offender should not be parole eligible. The process that they report in the jury room, which will be examined in a later chapter, thereafter resulted in opposite verdicts - death in People v. Cahill (a white man) and LWOP in People v. Owens (a black man).

IV. Isn't incapacitation the elephant in the jury room?

A number of states have excluded future dangerousness as an aggravating factor to be weighed by the jury. The apparent reasoning is that the exclusion from presentation to the jury a charge on the issue of the defendant's future potential danger to society if ultimately freed after serving his sentence, removes from the jury's consideration an issue that some think is speculative.[366]

This is part of the myth that future dangerousness is not considered in jury deliberation and sentencing in any state regardless of the statutory construct. While future dangerousness is

---

[365] Bowers and Steiner, *supra* note 360 at 677.

[366]The LaValle majority amplifies that the death penalty statues of Oregon, Oklahoma, Virginia, Wyoming and Texas all have future dangerousness as an aggravating factor. The note quotes Ex. Crom. Proc. Dole Art. 37.0171 §2[b][1] which asks the jury to decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society". *Supra* note 342, at fn 12 of LaValle.

a statutory sentencing factor in certain states, it is not in New York.[367] As we will see below, it is an actual factor in New York and in all capital sentencing situations – regardless of the statutory framework.

The New York death penalty statute does set forth the fourteen aggravating factors the jury may consider. Certain of these factors are the most common in other similar statutes and they inferentially may cause a jury to consider future dangerousness and thus incapacitation. The aggravating factors include:

1. Contemporaneous felony killings which are from 35% to 80% of all capital murder cases.
2. Predicate felonies. The New York Death Penalty statute sets forth aggravating factors which include as a factor the existence of two or more qualifying criminal convictions within the ten year period preceding the commission of the first degree murder for which the defendant is being sentenced.
3. "The defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim's death". Torture is defined as "depraved" infliction of extreme physical pain "evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain."
4. The slaying of multiple victims.[368]

[367]While perhaps collateral to this argument, remember that in Simmons v. South Carolina, 512 U.S. 154 (1994) in a plurality opinion, the court held that if a defendant's future dangerousness is at issue as a factor regarding aggravation, due process requires that a jury be informed of the fact that State law makes the defendant ineligible for parole.

The LaValle Majority correctly asserts that the New York statute does not require the jury to assess future dangerousness. The majority opinion states:

> "The deadlock instruction interjects the fear that if jurors do not reach unanimity, the Defendant may be paroled in twenty years and pose a threat to society in the future. Yet, in New York a Defendant's future dangerousness is not a statutory aggravation the jury may consider."[369]

Any sentencing entity, whether judge or jury, will want to know the defendant's legal history and will be weighing incapacitation. The New York statute, for example, does not include as a factor future dangerousness, but it does provide that prior relevant felony convictions constitute a possible aggravating factor to be weighed by the jury as well as the violence of the crime, and the relevance of that history is to show the defendant's chronicity and recidivism. When deliberating upon a first degree murder sentence, the notion that a jury will not weigh the defendant's possibility of release in the future, creating the risk that he may continue to commit new crimes in the future, is unrealistic and inconsistent both with basic common sense, as well as research findings into jury decision making -- because jurors use world knowledge and evaluating the future dangerousness of a proven killer is a basic thought process. Our interviews of members of two capital punishment juries suggest that early in their deliberation each jury made the unanimous

---

[368] N.Y. Penal Law §125.27, (McKinneys, 1995); James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41, 69-85 (1996).

[369] People v. LaValle, *supra* note 342, at 118.

determination that the defendant should not be eligible for parole ever.[370] Garvey found that future dangerousness was the most significant factor leading capital jurors to vote for death in sixty-one South Carolina cases. [371]

In a radical view, Bowers asserts that the Supreme Court holds that the jury's function is a "retributive assessment of the defendant's blameworthiness and guilt; it has made little mention of deterrence and explicitly has characterized incapacitation as a secondary consideration".[372]

Capital jurors do consider future dangerousness and that consideration is reasonable and to be expected. To ask a jury not to weigh incapacitation in a capital case (and to suggest that they would not) is almost the logical equivalent of asking the jury to defy the laws of gravity. They are sitting on a capital murder case, they are given aggravating and mitigating factors such as those under the New York statute to decide like the murder of a witness, murder during the commission of a crime, or two prior qualified felonies within ten years, but they are not to consider future dangerousness as a part of their decision making?

To understand if it is realistic to attempt to limit juries, rather than to give them realistic instructions, it is helpful to review how juries make decisions.

There are three generally accepted cognitive theories of juror decision making:

---

[370] People v. Cahill, *supra* note 343; People v. Owens, 188 Misc.2d 392 (N.Y.Sup. Ct., Monroe County, 2001).
[371] Garvey, *supra* note 363, at 1542.
[372] William J. Bowers, Marla Sandys & William Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Guilt-Trial Experience, and Premature Decision Making,* 83 Cornell L. Rev. 1476 at 1482, Footnote 17 (1997-1998).

1) Algebraic models: The most common utilizes Bayes' theorem wherein the judgment process is suggested to be starting from the probability of guilt and adjusting multiplicatively by new evidence into laws of mathematical probability "within the mathematical probability system there is a prescription for coherent probability revision in light of the evidence (Bayes Theorem). ... It is generally recognized that the Bayesian system is an invalid description of human behavior under most conditions".[373]

2) Cognitive Judgment Heuristics "the reigning metaphor that the juror carries a 'cognitive toolbox' of useful inference heuristics in long term memory, and selects relevant judgment tool algorithms, or strategies to solve the problem of making a legal decision". [374]

3) The Story Model: Pennington & Hastie put forth the story model theory of jury decision making which has achieved some acceptance while discrediting other theories of decision making.[375] The story model acknowledges and factors the role of extra evidentiary information into jury decision making following the story model.

The story model includes three component processes:

1) Evidence evaluation through story construction;

2) Representation of the decision alternatives by learning verdict category attributes;

---

[373] David W. Schum and Anne W. Martin, *Formal & Empirical Research on Cascaded Inference in Jurisprudence,* 17 Law & Socy Rev. 105 (1982).

[374] Garvey, *supra* note 364 at 42. William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Guilt-trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 at 1482, FN 17 (1997-1998).

[375] Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model,* 13 Cardozo L. Rev. 519 (1991) at 544-549.

3) Reaching a decision through the classification of the story into the best fitting verdict category.[376]

Active story construction under this theory occurs by reasoning from world knowledge and from evidence.

Utilizing a model derived from a simulated case in which the facts are that Johnson knifed Caldwell after they got into a fight, the authors offer the following as "a typical deduction from world knowledge":

> *"P1. A person who is big and known to be a troublemaker causes people to be afraid.*
>
> *P2. Caldwell was big.*
>
> *P3. Caldwell was known to be a troublemaker.*
>
> *C. Johnson was afraid.*

In this example, the juror matches features of Caldwell from undisputed evidence (P2) and a previous inferential conclusion (P3) to world knowledge about being confronted with such a person (P1) to infer that Johnson was afraid."[377]

The story model theory, based on mathematical testing, caused Pennington and Hastie to conclude that it is "an excellent method for explaining and predicting juror decision

[376] Pennington and Hastie, *supra* note 375, at 522.
[377] Pennington & Hastie, *supra* note 375, at p. 524.

making in criminal trials".[378] Reid Hastie examined the use of the story model in evaluating the decision making process of jurors.[379] He explains the role of emotion and expertise as elements which contribute to how jurors construct a story out of a set of facts. Using the outcome of the O.J. Simpson case as an example, Hastie holds that in certain factual situations, European American jurors will construct a different story from the same narrative evidence summary than African Americans because, for example, many African Americans have experienced or know of police misconduct and bigotry: "This background of experience beliefs and relevant stories made it likely that African-Americans would construct a story in which a police officer manufactured and planted key incriminating evidence." According to Hastie, this experience would contrast with the experience of European American jurors who would be less likely to have such a view of the police.[380]

It is the world knowledge factor which must concern those who believe that juries base their decision making free of extra-judicial influences. As Pennington and Hastie maintain, world knowledge is a significant factor which can be molded by judicial instruction.[381] Thus there is a material difference between telling a jury that you have two options and if you can't agree, the judge will sentence with a different, lesser option that includes parole and as compared to simply advising the jury that there are two options and neither includes the chance of parole. Given that the research indicates that if limited to two sentencing options, death or LWOP, jurors do not actually believe LWOP and infer an early release

[378] *Id.*
[379] *Id.*
[380] *Id.*
[381] Pennington and Hastie, *supra* note 375, FN 55.

date of ten years served, the deadlock option provides the jury with the third possibility which their world knowledge suggests to them is likely anyway. Can that knowledge be coercive any more than any other situation where the jurors know that a lesser finding will result in a lesser sentence?[382]

Since juries cannot be cleansed of their world knowledge and indeed are exhorted in most jury charges to use their common sense in evaluating the evidence, is not a more reliable outcome achieved by the jury knowing as much as possible to allow the legal reality to be assimilated into their decision making process and a result obtained? And since incapacitation will be weighed as to whether future dangerousness is an actual factor or not, doesn't giving the jury a complete range of options regarding sentencing, including deadlock knowledge, remove the speculation that concerns about future dangerousness will naturally spawn?

In the final analysis, the LaValle majority both failed to address the issue of jury speculation about parole when the choice is between LWOP or death and failed to confront the reality that future dangerousness, whether charged or not, will always be a factor in the jury deliberations. Jury uncertainty about incapacitation, given the unspoken concern about future dangerousness, is potentially a far greater risk to an outcome driven by extra-evidentiary factors than any coercive influence associated with the New York statutory deadlock charge.

---

[382]Bowers and Steiner, *supra* note 360, conclude that jurors believe they know that LWOP results in parole after a relatively short sentence served and the more brief that jurors believe the sentence will be, the more likely they will vote for death.

Although addressed at length in later chapters, permitting jurors to be aware of the prior bad acts of the defendant or the defendant's criminal record could have a significant impact on outcome. One likely motivation is incapacitation. A simulation study performed by Sally Lloyd Bostock in England and Wales regarding juror knowledge of the history of the defendant's prior crimes demonstrate that jurors with such knowledge were more likely to convict, however the results are seen as more nuanced by Mike Redmayne.[383]

Juror knowledge of a defendant's history must necessarily raise the spectre of incapacitation through the finding of guilt, as well as the belief that given past crimes the defendant is more likely to have committed the crime at bar.

V. Is Jury Selection Coercive Thereby Creating Pro Death Penalty and Racially Biased Juries?

Pursuant to Witherspoon v. Illinois in capital jury selection the exclusion of those jurors who declare that they could never vote to impose the death penalty (or would not be impartial in deciding guilt) is allowed in any circumstance, even if the aggravating factors are found and no mitigating factors are proven. This process is called death qualification – finding jurors able to vote for the death penalty if the evidence indicates it.[384]

Thompson, et al define excluded potential jurors as guilt nullifiers and penalty nullifies -- defining nullifiers as jurors who refuse to follow the law in deciding the case:

> "The jurors who are excluded during death qualification fall into two partially overlapping categories. *Guilt nullifiers* are those whose feelings

[383] Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record; A Simulation Study* [2000], Crim. L.R. 734; Mike Redmayne, *The Relevance of Bad Character*, [20020 61 Cambrdg L.J. 684, 699-714.
[384] Witherspoon v. Illinois, 391 U.S. 510 (1968).

about death penalty render them unable or unwilling to be impartial when deciding guilt or innocence in a capital case. *Penalty nullifiers* are those who are unable or unwilling to be impartial during the penalty phase of the trial. The two categories partially overlap because some potential jurors are both guilt nullifiers and penalty nullifiers, but a significant number would nullify only on penalty."[385]

The most recent standards for disqualification are set forth in Wainwright v. Witt, (limiting the State's power to exclude opponents of death penalty) and Morgan v. Illinois, (requiring the exclusion of some strong proponents of capital punishment) and Lockhart v. McCree which holds that the exclusion of the death penalty opponents from the guilt phase of capital trials is constitutional.[386] Gross argues that the exclusion of death penalty opponents affects the decision on guilt or innocence and that the very discussion of the death penalty during voir dire "tends to create the impression that guilt is a forgone conclusion".[387]

Cowan, Thompson, and Ellsworth concluded in 1984 that the process of death qualifying a jury makes the jury more likely to vote for conviction. Moreover, they argued that the death qualification process frequently eliminates jurors who might otherwise have provided insights and diverse viewpoints within the jury room that could have affected outcome.[388]

Haney's examination of the possible biasing effects of the death qualification process concluded, based upon a study conducted of mock jurors, that those mock jurors who went

---

[385] William C. Thompson, C.L. Cowan, & P.E. Ellsworth, *Death Qualifications After Wainwright v. Witt and Lockhart v. McCree,* 185 Law & Hum. Behav. 187 (1984).
[386]Wainwright v. Witt, 469 U.S. 412 (1985). Morgan v. Illinois, 504 U.S. 719 (1992). Lockhart v. McCree, 6 U.S. 162 (1986).
[387] Samuel Gross, *Lost Lives: Miscarriage of Justice in Capital Cases,* 61 Law & Contemp. Probs. 125 at 147 (1998).
[388] Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth *The Effects of Death Qualification Jurors Predisposition to Convict and on the Quality of Deliberations,* 8 Law & Hum. Behav. 53 (1984).

through a death qualification voir dire were more likely to believe that the defendant was guilty and that capital punishment was indicated than mock jurors who did not experience the death qualification process.[389]

The present practice in most states of the U.S. in capital cases is to present a large jury pool with detailed questionnaires. The custom and practice is to give a brief overview of the nature of the case, the questionnaires are filled out and turned in and copies provided to each of the attorneys. For example, in both Cahill and Owens hundreds of potential jurors were summoned for the initial meeting with an overview presentation by both sides, and then questionnaires are filled out and evaluated over several weeks. Certain of the venire are eliminated based on their responses to the questionnaires because they are not death qualified. Other forms of disqualification by consent occur with judicial supervision as the judge and the attorneys review the questionnaires. The remaining jurors then are again summoned and individual voir dire occurs with the judge and counsel. The voir dire still includes peremptory challenges and challenges for cause.[390]

Thus, to some extent assumptions regarding the effects of biasing during voir dire are mitigated.[391] The author is unaware of any studies that show that individual voir dire has the effect of tilting the venire toward a death sentence.

---

[389]Craig Haney, *On the Selection of Capital Juries – The Biasing Effects of the Death-Qualification Process*, 8 Law & Hum. Behav. 121 (1984).

[390]Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England and Canada*, 16 Loyola LA Int'l & Comp. L.J. 201. Even though virtually eliminated in England and Canada, and viewed as a racist tool by some American jurists, peremptory challenges remain alive and well in the U.S.A. as noted in the prior chapter.

[391] *Id.*

Based on detailed interviews, Fleury-Steiner argues that "death-qualified" citizens who make life or death decisions as jurors are characterized by a politics of the insiders - a constellation of beliefs that ignores prevailing social and economic inequities, and, by default, blames "immoral outsiders" for their own marginality".[392] Fleury-Steiner asserts that capital jurors "do not focus directly on defendant's racial inferiority but affect outcome in racially significant ways in a process of at least two steps:

> 1. They construct themselves as a small group, and through this sense they respond to the accused and to characteristics of the accused.
> 2. The small group identity they construct is one of insiders, and through it they cast the accused as an outsider. Racial and other characteristics of the accused figure in as related to outsider identity."[393]

Fleury-Steiner unabashedly acknowledges his personal bias against the death penalty -- a bias that is discernable from the juror survey which he conducted using narrative analysis. Having co-authored the study which argues that death qualification leads to "a penchant for conviction and a predisposition for imposing death", those conclusions certainly are contributors toward his bias.[394]

Fleury-Steiner melds the underlying finding of racism with reports of intellectual bullying and browbeating within the jury room, reporting that jurors who hold out against the death penalty were subject to verbal abuse and intimidation in certain cases. He ascribes a

---

[392] Benjamin Fleury-Steiner, Jurors Stories of Death: How America's Death Penalty Invests in Inequity, at 9 (The University of Michigan Press 2004).
[393] *Id* at 8.
[394] Bowers and Steiner, *supra* note 360, at 654.

racist's rationale to juror observations such as a lack of remorse by the Defendant and he gives subjective interpretations to jurors' statements that might otherwise be innocuous.[395]

There are three problems, if not flaws, in the entire analysis which is critical of death penalties jury selection put forward Fluery-Steiner and by Bowers, Thompson, Cowan, and Haney:[396]

1. The elimination of jurors who acknowledge that they cannot follow the law (preconception) or keep an open mind with regard to the subject matter of the trial (bias) is a fundamental American legal principal which acknowledges that jurors must weigh facts and witnesses based on their collective backgrounds and experiences. For example, the jury charge in New York State provides:

> "You have been told that you are the judges of the facts, as I am of the law. Judging the facts includes judging how believable are the witnesses called to prove them. You are to determine what weight to give any evidence, how big it is, or how little it is, or how lacking it is. It is for you to determine that for yourselves, what evidence you will accept, what evidence you will reject, and you are to determine how good or how poor or how great or how flimsy it may be. That you determine for yourselves.
>
> How are you going to determine how much belief you are going to give any witness? There is no yardstick. Each of you, as judges of the facts, determines that for yourself. Each of you applies you experience in life, your own intelligence, and every test you have found useful in your own life experience to decide whether anybody–he or she, business or social contact, friend of acquaintance–has talked to you frankly, or has lied. Every living soul forms some means of method of judgment of other human beings in this regard–you do it every living day.

---

[395] Fleury-Steiner, *supra* note 392, at 51-52 and 58; Koehler- Riesman, *supra.*

[396] Bowers, *supra* note 372, William C. Thompson, C.L. Cowan & P.E. Ellsworth, *Death Qualifications After Wainwright v. Witt and Lockhart v. McCree*, 13 Law & Hum. Behav. 185 (1989).

> To decide in your own mind, as you must, how far, if at all, every witness is to be believed, you apply your own personal everyday test of truth or falsity, which in your own life you have found practical and reliable. You may consider the appearance of the witnesses on the stand, whether they looked and acted as if they were attempting to answer the questions frankly and honestly, whether they seemed to be trying to hold back, or whether they impressed you as being outright in attempting to lie.
>
> Each one of you is to determine this thing we call credibility–the believability of each and every witness–for yourself. On your own personal, mental decision about this, you will base how much credit, how much belief, and how much value, you will give to the testimony of each witness."[397]

The above charge exhorts jurors to use their common experience, their experiential toolbox. While at the same time following the law, how can a juror who cannot apply the law because they oppose the death penalty fairly follow this charge, and is it surprising given this charge that jurors of different races and/or from different socio- economic backgrounds might arrive at different conclusions from the same evidence?

2) Their studies do not fully embrace the advent of Batson v. Kentucky and its progeny, as well as the now highly prevalent use of questionnaires and

[397] Howard G. Leventhal, Charges to the Jury and Requests to Charge in a Criminal Case in New York, 2 CJI [NY] 4.41 (2004)

individualized voir dire so that prospective jurors do not hear repetitive references to the death penalty over many full hours.[398]

3) While not applicable to the studies by Cowan and Haney, a number of capital trials are impacted by a tacit or actual acknowledgment of guilt by defense counsel at jury selection or early in the trial. Thus commencing from voir dire, the jury is aware that the contention by the Defendant and the purpose of the trial is not one of innocence but rather mitigation. Because the defense frequently advises the jury during voir dire that mitigation is the main defense posture, the failure of the data of Thompson and Bowers to consider this nuance raises the concern that their claim that jurors are predisposed to guilt and thus prematurely considered punishment in the guilt phase is unfair because guilt is not actually being contested, in reality the only contest is regarding the aggravating factors.[399] Thus the predisposition toward guilt may in many cases be directly related to the admissions by the defense of guilt in the voir dire and opening statements.

---

[398] Batson v. Kentucky , 476 U.S. 79 (1985). The conventional wisdom is that applying a racial test to exercise the use of peremptory challenges (the right to strike a juror for no reason given) violates equal protection. Batson was limited in that it applied only to the prosecution, only to criminal trials and only to racial challenges. In Edmonson v. Leesville Concrete, 500 U.S. 614 (1991) the Court inferentially expanded Batson to criminal defense lawyers. In Powers v. Ohio, 499 U.S. 400 (1991) the Court expanded the application to any racial exclusion, regardless of whether or not the excluded are of the same race as the defendant. The issues are now resolved intra-trial by hearings in which a good faith non racial basis must be given for the exercise of peremptory challenges if requested by the opposition and the judge believes facially there is a question.

[399] This practical reality is epitomized in the State of New Jersey v. White, *supra* note 356, the Court noting at page 73 that "Frequently punishment is the only real issue in a homicide trial".

McAdams offers a countervailing view regarding the issue of racial unfairness in capital jury verdicts offering the conclusion that "we have a criminal justice system that punishes those who murder whites more severely than those who murder blacks."[400]

If correct, McAdams upends the argument that the race of the defendant is an essential element in arriving at the conclusion that the death penalty is given to blacks disproportionately and the system's more likely to execute blacks – what McAdams labels the "mass market" racial disparity argument.[401]

McAdams, utilizing nationwide United States Crime Statistics, argues in support of the other option to the mass market argument – the specialist argument, which holds that there is a lack of concern for black murder victims:

> 1) He acknowledges that blacks are over represented on death row. 41.7% of the death row population from 1977 is black and 38.7% of all prisoners executed since then were black.
>
> 2) However, he finds that in 1965, 5124 murders and non-negligent manslaughters were committed by blacks, whereas 4405 were committed by whites.

[400] John C. McAdams, *Racial Disparity and the Death Penalty,* 61 Law & Contemp. Probs., 153, 170 (1998).
[401] *Id* at 154-155.

3) He also finds that blacks murdered blacks in 4422 cases. Blacks murdered whites in 69 cases, whites murdered whites in 4124 cases, and whites murdered blacks in 281 cases.[402]

4) In analyzing the race of the suspect and the race of the victim based upon a large previously published study, McAdams argues that:

> A. Black on white murders are treated no differently than white on white murders.
>
> B. Whites who murder blacks are treated more harshly than blacks who murder blacks.
>
> C. Blacks who murder whites and whites who murder whites are treated more harshly than if the victim was black.[403]

McAdams makes the point that adjusting for aggravating factors is indeed difficult, if not guesswork, and thus attempting to evaluate outcomes by statistical analysis is not without risk.

As fully discussed in Chapter 2, why juries reach certain decisions and whether they are influenced by external non-evidential matters such as religious beliefs or racist judgments is difficult to determine because of the general protection in the U.S.A. and England and

---

[402] *Id.*, at 155.
[403] *Id.*, at 161-170.

Wales of the jury's deliberations. The two most significant cases examined in Chapter 2 which are relevant to the issue of prejudice and the procedural and philosophical problems associated with going behind the jury's verdict, are People v. Harlan and R. v. Mirza.[404] In People v. Harlan a capital jury's consultation of bible passages while sequestered in their hotel and in the jury room was found to be an extra evidentiary factor resulting in the court overturning a death verdict. In England and Wales in Mirza, where the protection of the jury deliberation process far exceeds American protections, the Law Lords declined to conduct a hearing on the accusation that race was interjected into jury deliberations with a vigorous dissent from Lord Styn, despite an allegation by a juror of specific statements indicating a bias against the defendant, who was an immigrant who required an interpreter.[405]

VI. Is Jury Confusion Coercive?

The previous chapter examined jury confusion from the perspective of Lord Mansfield's Rule and limitations on post trial examination of jury outcomes.

It is also argued that jury confusion is the basis of coercive jury verdicts. Bentele and Bowers utilized Capital Jury Project interviews to conclude that capital jurors in the sentencing phase are improperly influenced by the guilt phase of the trial, misinterpret the judge's instructions and believe that a finding of aggravation mandates capital punishment

[404] People v. Harlan, 8 P.3d 448, 2005 Colo. LEXIS 310 (2005); R. v. Mirza, [2004] WL61975; [2004] UKHL 2; [2004] 1 A.C. 1118; [2004] 2 W.L.R. 201.

[405] People v. Harlan, *supra* note 404; R. v. Mirza, *supra* note 404.

and discount mitigation as the giving of excuses.[406] Particularly concerning is the argument that misinterpreted jury instructions result in the jurors believing that a finding of aggravation requires a sentence of death. Cowan, et al found that jurors used in a mock trial setting had a less than perfect memory of instructions given that day answering 11.58 of 18 true/false questions correctly about the charge.[407]

Bentele and Bowers describe their findings as follows: In their interviews, some jurors explicitly stated that it was their belief that aggravation required death; others used language that more indirectly conveyed the same impression. Accordingly, jurors reported that at the penalty deliberations, they arrived at a death sentence based on the presence of one or more aggravating factors that, to their minds, led necessarily to that penalty. Jurors in all the states in the study described this determinative role of aggravating factors. Even in California, where jurors are instructed to consider sentencing factors that are not designated as aggravating or mitigating and then to weigh aggravating against mitigating circumstances, a surprising number of jurors reported their belief that a particular fact in aggravation required a death sentence. Not surprisingly, in light of the structure of its statute, the perception that death was the mandatory sentence under certain circumstances,

---

[406] Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming: Aggravation Requires Death and Mitigation is No Excuse,* 66 Brook L. Rev. 1035 (2001).
[407] Claudia L. Cowan, William C. Thompson & Phoebe Ellsworth, *The Effects of Death Qualification: Jurors Predisposition to Convict and On the Quality of Deliberations,* 8 Law & Hum. Behav. 53 (1984). This further calls into question the accuracy of the Capital Jury Project interviews conducted with jurors about the judge's charge months if not years after the trial.

particularly if jurors thought the defendant would be dangerous in the future, was most prominent under the directed statute in Texas.[408]

The authors point out that none of the above-referenced states require a death penalty sentence even if aggravating factors were found. Based on lay juror interviews substantially after the trial, they extract out parts of jurors' interviews to show confusion. For example in interviews with Kentucky jurors, four South Carolina jurors and three California jurors where future dangerousness were a statutory factor, Bentele and Bowers conclude some jurors conveyed a distinct impression that finding an aggravating factor was the end of the inquiry. They infer from the following statements that there were juror misperceptions of the jury charge which resulted in a death penalty determination:

> J: In fact we had to according to the judge's instructions give capital punishment.
>
> J: If there was no reasonable doubt he gave us our choices, there was no choice if there was no reasonable doubt. We could find him guilty - I mean we already found him guilty.409
>
> J: Two major ...robbery and murder. To South Carolina law, that would be sufficient reason to give him the death penalty.[410]
>
> J: If you followed it and got yes for this part and yes for this part it all kind of fell in place it seemed like, ... it just kind of progressed us into...there is really not much choice, well you always want to have a choice I guess but....[411]
>
> J: What would the defendant do if set free? Would

[408] Ursula Bentele and William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming: Aggravation Requires Death and Mitigation is no Excuse*, 66 Brook L. Rev. 1032 (2001).
[409] *Id.*, at1035.
[410] *Id.*, at 1033.
[411] *Id.*, at 1033.

> [the defendant] kill again? The law said the defendant must get death because he murdered–the solicitor explained that this was required by law.[412]
>
> J: But after studying the law, what the law requires and her danger that she would be even if she was in prison, that another vote was taken and it was unanimous.[413]
>
> In interviewing several California jurors, they report:
>
> J: "That it was pretty well cut and dried....You know, in order to get the death penalty, you got to have this to give support to the death penalty...."[414]
>
> J:Kind of what it did was allow her to vote yes without,
>
> sort of it was the wording, it wasn't that we changed her mind, but somehow she was able to accept the argument, I think she finally had to admit that he would easily hurt someone else and that our instructions said in that case we were required to give death."[415]
>
> J: The instruction, what the law specified. From what I remember the law said if he's guilty of murder and the murder was committed with special circumstances that the death penalty was appropriate".[416]

The interviews which are the basis of the author's conclusions were conducted long after the verdict was rendered. In some instances the above-juror comments inaccurately state the law. In other circumstances the authors appear to misinterpret the jurors' statements. The absence of follow up questions is telling to clarify if certain of the above jurors were stating that the judge's instructions mandated the death penalty, as compared to their expressing that the facts and the instructions caused the jurors to conclude that their verdict was death.

---

[412] *Id.*, at 1033.
[413] *Id.*, at 1033.
[414] Bentele, *supra* note 408, at 1035, note 88.
[415] *Id.*, 1035.
[416] *Id.*, 1036.

The Bentele and Bowers study was preceded by Eisenberg and Wells' conclusions that: jurors' false expectations about alternatives to the death penalty influenced sentencing decisions; that jurors do not understand burdens of proof as described in the Judge's instruction; and that the confusion works against the defendant.[417] By implication the interviews, based on a fifty-page interview instrument, presumably occurred after some time elapsed from the date of actually hearing the judicial instruction in Court. No representation is made that the juror was given the actual instruction to review for the purpose of refreshing recollection – thus the consequent conclusions that the jurors did not understand the burden of proof regarding aggravation and mitigation is not surprising and not persuasive that jury confusion or misapplication of the jury charge led to the verdict.

This is not to discount the possibility that jury confusion has happened and could occur in the future.

Elizabeth Thornburg, in her analysis of civil juries, argues for general verdicts whenever possible given the possibility of jury confusion resulting from special verdicts.[418]

Some authors have argued that capital jury charges are confusing and that the charge should be both delivered orally and given in writing to the jury.[419] Presently there does not exist any data to evaluate the effectiveness or problems related to this change.

---

[417] Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital* Cases, 79 Cornell L. Rev. 1 (1993-1994).
[418] Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury,* 66 Fordham L. Rev. 1837 (1998).
[419] James R. Acker and Charles S. Lanier, *Law, Discretion and the Capital Jury: Death Penalty Statues and Proposals for Reform,* 32 *Crim L. Bull.*,1134, 1173-1178 (1996).

However, the only fair way to truly measure the jury's understanding of complicated legal instructions is to interview the jurors immediately post-verdict and/or to allow them to review the charge post-verdict.

VII. Is Race as an Extra Evidentiary and/or Coercive Force Upon Juries?

We have seen above that the content of voir dire and the elimination of jurors who are opposed the death penalty has caused some to argue that the process jades the remaining jurors toward death and creates a jury that is more likely to convict minorities and vote for the death penalty.

According to certain commentators, race is an extra-evidentiary influence that can even rise to coercion in the jury room. Thus, how jurors are selected during voir dire and how they deliberate are connected – who they are influences how they evaluate evidence while interacting with others in the jury room.

A) Jury Selection

> "One of the largely unique aspects of the American Jury system is that it confers upon the parties the unilateral power – in the form of peremptory challenges – to remove prospective jurors for any non-racial or non-gender based reason".[420]

[420] David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Case: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 at 10 (2001).

In a series of decisions, the United State's Supreme Court has banned the use of race by counsel as a basis for the exercise of a peremptory challenge, finding it is prohibited by the due process clause of the Fourteenth Amendment, reasoning that a prospective juror's race is unrelated to his fitness as a juror. This was extended to gender."[421]

The Baldus study quoted above is the more recent of five studies regarding the racial implications of the peremptory challenge.[422] The Baldus study finds that Batson, McCollum and JEB have not succeeded in avoiding race and gender based discrimination. Baldus argues that this is concerning because Bowers reports that, having sampled 340 penalty trials from 14 states, the presence of one or more blacks on the jury was associated with lower death sentencing rates in black defendant cases.[423]

Baldus, et al found little change in the rate of peremptory strikes of blacks in jury selection post-Batson and McCollum. They offer two explanations, the first that moderate discrimination is unlikely to have judicial sanction, the second is a real belief on the part of both the prosecution and the defendant that the race of the jury will effect outcome. Baldus confirms Bowers' findings that the presence of black jurors reduces the probability of the death sentence. In fact, Baldus found that where black jurors exceeded the median, there is a nine percent decline in death penalty convictions.[424]

---

[421] Baston v. Kentucky, 476 U.S. 29 (1986) Georgia v. McCollum, 505 U.S. 42 at 59 (1992). JEB Ex Rel TB, 511 U.S. 127 (1994).
[422] Baldus, Woodworth, et al., *supra* note 420, at 23.
[423] Baldus, Woodworth, et al., *supra* note 420, at 23; William J. Bowers, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001).
[424] Baldus, Woodworth, et al., *supra* note 420, at 108.

The research of Hastie, Pennington, and Saks and Kidd regarding juror decision making offers a scientific explanation for these findings utilizing either heuristic analysis or the story model. Each juror brings to the process either a tool box of experience or an established format of life experience and understandings that will be incorporated by the juror in making decisions.[425]

B) Jury Deliberations

Analysis of outcomes has some value in evaluating the role of race in the jury deliberation process.[426] Sorensen and Marquart cited statistics showing that white offenders have the highest conviction rate, higher than black or hispanic offenders. However, the authors stated:

> "While this finding refutes suggestions of racial discrimination based on the race of the offender, it appears that racial discrimination on the basis of the race of the victim exists. Cases involving white victims are twice as likely to result in conviction than are Hispanic-victim cases, and five times as likely to result in conviction than are cases involving black victims. From this analysis, it appears that homicides involving white victims are the most aggressively prosecuted in the pre-sentencing stages, while homicides involving black victims are prosecuted less vigorously during the pre-sentencing stages of processing. This discrepancy reflects a devaluation of the lives of black victims."[427]

---

[425] Michael J. Saks and Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 Law & Soc. Rev. 123 (1980-1981); Nancy Pennington and Reid Hastie, *supra,* at pg. 544-549.

[426] Samuel R. Gross and Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing*, Northeastern Community Press (1989) at 47.

[427] Jonathan R. Sorensen and James W. Marquart, *Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases,* 18 N.Y.U. Rev. L. & Soc. Change 743 (1990-1991) at 775.

Sorenson and Marquart offer the following caveat regarding their findings:

> "Intra-racial killings occur more often between individuals with a prior personal relationship. This legal variable could partially explain the discrepancy in conviction rates. In addition, killings involving white offenders or white victims may involve the most serious felonies or most dangerous types of weapons. (Hence, it is necessary to simultaneously control the effects of these legal variables when considering the effects of racial combinations on pre-sentence decision-making)."[428]

Baldus, et al, find that the identity of the victim is significant in jury considerations. In a study of Philadelphia capital cases and non-capital cases for six years between 1983 and 1993, Baldus concluded that while the D.A.'s office endeavors to prosecute capital cases across the board in a uniform way, juries were:

1. 14% more likely to give a black a death sentence than a similarly situated non-black defendant.
2. More likely to impose death sentences for want of a finding of mitigation when the victim was non-black;
3. More willing to find statutory aggravation present in black defendant with non-black victim cases.[429]

In this regard Baldus is revisiting an earlier theme.[430] Baldus chronicled the capital murder case, McCleskey v. Kemp in which the offender alleged that his death sentence was

---

[428] *Id.*, at 775.

[429] David Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: an Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 ((1998).

unconstitutional because it had been imposed discriminatorily based upon his race and the race of his victim (a white police officer).[431] As a consequence, McCleskey alleged Fourteenth Amendment due process violations and an Eighth Amendment violation by virtue of his death sentence, alleging that his indictment was cruel and inhuman treatment. An application was made to the District Court which resulted in two weeks of hearings in which Baldus and his team argued that the defendant, who is black, had a significantly higher chance of a death sentence because the victim was white. These arguments were rejected by the District Court, the Circuit Court of Appeals and the U.S. Supreme Court.[432]

Garvey, in a study of 41 South Carolina capital jury cases, found that while the race of the defendant generally appears to have little effect on juror reactions to aggravating and mitigating circumstances, it does appear to influence juror reactions to future dangerousness. [433] Garvey found that sixty-one percent of white jurors felt future dangerousness was a significant factor that would make them more likely to vote for the death penalty, whereas only thirty-seven percent of black jurors viewed future dangerousness the same way.[434] The unanswered question from Garvey's survey is why.

VIII. Coercive Forces Effecting Judicial Decision Making

Legal scholars have debated for some time whether or not judicial ambition or incumbency preservation can have a coercive effect on judicial decision making in capital cases, many

---

[430] David Baldus, George Woodworth, Charles A. Pulaski, Jr., Equal Justice and the Death Penalty – A Legal and Empirical Analysis, (Eastern U. Press, 1990).
[431] McClesky v. Kemp, 107 S. Ct, 1756 (1987); *see also* McClesky v. Zant, 580 F. Supp. 338 (ND GA. 1984).
[432] *Id.*
[433] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Col. L. Rev. 1560 (1998).
[434] *Id.*; Garvey at FN 92 page 1560 cites two other studies which also indicate that future dangerousness plays a significant role in jury sentencing decisions.

concluding that extra-evidentiary matters are a factor. Others find judicial fact finding to be more competent, reassuring, and reliable.

The most powerful critic of allowing elected judges to preside over or decide capital cases is Associate Justice of the United States Supreme Court John Paul Stevens, who in a stinging assault in Harris v. Alabama, stated:

> "I am convinced that our jury system provides reliable insulation against the passions of the polity. Voting for a political candidate who vows to be "tough on crime" differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death. Jurors' responsibilities terminate when their case ends; they answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done. More importantly, they focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals who, in the abstract, may appear unworthy of life."[435]

Liebman maintains:

> "The last thing an elected trial judge wants (trial judges in death sentencing states are almost all elected; many of them began their political careers as prosecutors) is a district attorney's angry statement on the evening news blaming 'the peoples' defeat in a capital case on a trial judge's decision to suppress evidence, limit questioning or withhold a desired instruction".[436]

Liebman, Fagan and West appear to contradict Liebman's earlier argument and that of Bright and others that elected judges do not have the courage or integrity to preserve fundamental rights, stating:

---

[435] Harris v. Alabama, 115 S. Ct. 1031 at 1039 (1995).
[436] James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030, at 2111.

> "Appointed federal judges are sometimes thought to be more likely to overturn capital sentences than state judges, who almost always are elected in capital-sentencing states. In fact, state judges are the first and most important line of defense against erroneous death sentences. They found serious error in and reversed 90% (2,133 of the 2,370) capital sentences that were overturned during the study period."[437]

Regarding the extent of serious error, Liebman, et al found the following:

> "Even before any federal courts become involved, state courts across the country find serious error in close to half (at least 47%) of the capital judgments that reach their two checkpoints.
>
> ·State courts found capital error rates of 40% or more in five-sixths of death-penalty states. They found serious error in 60% or more of the capital judgments in a fifth of those states.
>
> ·A number of the states in the nation's "death belt" (where most American death sentences are imposed and the largest death rows exist) have some of the nation's highest rates of serious capital-sentencing error– by the lights of the state's own elected judges: Florida at 58%; Alabama at 59%; South Carolina at 62%; North Carolina at 65%; Mississippi at 69%; and Maryland at 77%."[438]

This is in contrast to Bright's and Keenan's findings in "In Judges and the Politics of Death". They argue that elected judges appoint incompetent counsel and failed to protect basic constitutional rights.[439] Bright notes that in certain circumstances judges have been defeated for reelection after issuing constitutional rulings because they were characterized as pro-defendant. He also cites the prominent role of Governors who appoint judges, and

---

[437] James Liebman, Jeffrey Fagan and Valerie West, *Broken System: Error Rates in Capital Cases,* 1973-1995 (2000), www.thejusticeproject.org.
[438] *Id.*
[439] Stephen B. Bright and Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,* 73 Bos. L. Rev. 759 (1995).

Presidents GHW Bush and Clinton in seeking strong anti-crime oriented appointed Federal Judges.

Bright likewise holds out that many of the elected judges in the State of Texas commit judicial indiscretion in death penalty cases. Bright maintains that the elected Texas judiciary adversely impacted death penalty cases by appointing incompetent counsel to handle trials and appeals.[440] Indeed, he asserts that in Texas there is no requirement that defense counsel be awake, prepared, free of conflicts or adequately compensated in capital cases. Bright argues:

> "The Texas Judiciary has amply demonstrated the need for full review of convictions and death sentences by independent, life-tenured federal judges who are not in danger of being voted out of office for an unpopular, but legally required, decision."[441]

A helpful consumer survey reported by Daniel W. Shuman and Anthony Champagne shows that judges selected according to a "merit" plan – an expert commission recommending to the Governor a list of qualified candidates for appointment – are not necessarily superior to popularly elected judges.[442] Indeed, surveys found not only were the educational, experiential or "cosmopolitan" characteristics comparable, a ranking by lawyers of 324 Supreme Court judges found that the merit selection plan eliminated the

---

[440] Stephen B. Bright, *Elected Judges and the Death Penalty in Texas,* 78 Tex. L. Rev. 1805 at 1818 (2000).
[441] *Id.,* at 1832.
[442] Daniel W. Shuman and Anthony Champagne, *Removing the People From the Legal Process: The Rhetoric and Research On Judicial Selection and Juries,* 3 Psychol. Pub. Poly & L. 252 (1997).

poorest quality judges; however, elected judges received the highest ranking.[443] "If lawyers' rankings of judges can be trusted, elected judges had a far greater range in quality than Missouri plan judges (merit) in that election produced the best ranked and lowest ranked judges"[444]

It should be noted that surveys in civil cases show that judges generally have a high regard for jury outcomes in trials before them.[445] Chapter 8 reports a survey for this paper regarding outcomes in bench and jury trials that will further examine the role of the judge in complex cases.

IX. Does Public Opinion Have a Coercive Influence?

In Proffitt v. Florida, and Jurek v. Texas, the Supreme Court established guidelines that addressed the jurisprudential defects delineated in Furman v. Georgia.[446] The Gregg and Jurek Courts set forth a bifurcated process in which guilt would first be determined, then a separate stage in which punishment was to be decided declaring specific and clear statutory guidelines for making a life or death decision and automatic review on appeal by the State's highest Court.

Death penalty opponents have published extensively on the coercive nature of public opinion and electoral politics, which they claim results in death sentences in

---

[443] Henry Glick, *The Promise and Performance of the Missouri Plan,* 32 U. Miami L. Rev. 509, 520-1 (1979).
[444] David W. Shuman and Anthony Champagne, *supra* at note 123 at 126.
[445] Neil Vidmar and Shari Seidman Diamond, *Juries and Expert Evidence,* 66 Brook L. Rev. 1121 (2001) at 1176.
[446] Proffit v. Florida, 428 U.S. 242 (1976). Jurek v. Texas, 428 U.S. 262 (1976). Furman v. Georgia, 408 U.S. 238 (1972).

disproportionate numbers before elected judges with appellate review conducted by elected Judges, as well as a tendency by juries to be in favor of death.

Many efforts have been made to evaluate the public's posture regarding the death penalty. In 1995 Bowers, Vandiver and Dugan argued that the standardizing polling questions (SPQ) about the death penalty have been phrased in such a way that has invited the misinterpretation that has occurred.[447] Bowers argues that the SPQ "asks whether or not people favor the death penalty, not whether they think it is the best or most appropriate punishment for convicted murderers. Thus it reflects acceptance, but does not indicate preference for the death penalty over alternative punishments."[448]

Bowers' polling data further reflects a public preference for lengthy imprisonment and restitution when the public is further questioned. Indeed, 1991 citizen surveys found that New Yorkers preferred LWOP and restitution – a form of restorative justice – to the death penalty. The survey showed that 47.4% strongly favored capital punishment and 23.2% somewhat favored it. However, the survey found that 54.5% of the sample preferred LWOP if the "sentence to life in prison (was) with absolutely no chance of ever being released on parole or returning to society". [Parenthesis added] The preference grew to 73.0% with LWOP and restitution.[449]

Samuel R. Gross is critical of the phraseology of Bowers' questions:

> "The questions are worded forcefully and we asked repeatedly with escalating non-death sentences – from

[447] William J. Bowers, Margaret Vandiver, and Patricia Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer,* 22 Am. J. Crim. L. 77 (1994-95).
[448] *Id* at 85.
[449] *Id* at 103

> 'parole after 25 years' to 'no chance of parole' plus restitution. . . .
>
> The Bowers.. version of the life without parole question – "would you prefer this (punishment) as an alternative to the death penalty?" Some respondents who agreed might have meant that they wanted life without parole to be available, along with the death penalty, as an alternative. If so, they should be categorized as supporters of capital punishment because the death penalty is always discretionary in the U.S., whatever the lesser penalty."[450]

Gross reports that a series of studies show that most Americans "believe that murderers who are sentenced to life imprisonment are released in twenty or ten or even seven years.[451] Gross concludes that the public is more interested in retribution than incapacitation, concluding that "most Americans favor the death penalty because they feel that killing is wrong; their favorite explanation is 'a life for a life'"[452] However, the pendulum regarding public opinion may be shifting. A 2005 poll found that 56% of New Yorkers surveyed stated that they favor life without parole or with the possibility of parole for people convicted of murder. Contrasted against a 1994 poll, 34% said that they supported the death penalty, a significant drop from 47% in 1994. [453]

X. Applications to England and Wales and Canada

The research that has followed American capital punishment jury verdicts is overwhelming, detailed, invasive, and frequently tainted by the opinions of the researchers.

---

[450] Samuel R. Gross, *Public Opinion on the Death Penalty,* 83 Cornell L. 1448 (1998) at 1454-1456.
[451] *Id.*, at 1456-1467.
[452] *Id.*, at 1472.
[453] Michael Slackman and Margorie Connelly, *Pataki's Rating Declines Sharply in Poll of State,* N.Y. Times, February 15, 2005 at A1.

Recognizing the philosophical differences, capital punishment is a uniquely American criminal sentence between the comparator nations. The function of capital sentencing juries is distinctly relevant to the comparators. First there is the obvious fact that imposing a capital sentence is the gravest form of verdict to be rendered. Second, the complexity, that is the combination of emotion and the weighing of statutory factors having already rendered a verdict of guilt, poses unique opportunities to study how the jury works and examine the impact of the detailed knowledge of the crime and the judge's charge on juror decision making.

Americans can lay claim to tremendous experience, some positive, much negative, in the problems posed by diverse society in a court of law. More and more the problem posed by race, as accentuated in the prior chapter in the case of R. v. Mirza, demonstrates that legal prophylaxis against verdicts that may be tainted by race is easier said than done. And as the capital cases demonstrate, there is little confidence in some quarters that resorting to trial by judge for greater fairness is a realistic remedy. In the prior chapter it is suggested that voir dire may provide some protection against racial bias on the jury in England and Wales and Canada, where the jury is randomly selected.

Issues posed by intra evidentiary influences such as race and jury charges (judge's summing up) remain a source of concern.

A. Juries

Honess, Levi and Charman in a simulation study found that twenty six percent of the simulated jurors utilized heuristics, "general 'rules of thumb' about 'how the world works" in their reasoning".[454]

Such a reliance by jurors on heuristics could include accepting racial stereotypes about blacks, hispanics, jews, orientals, aboriginals, virtually every non-Caucasian defendant tried in England and Wales, the U.S.A. or Canada. Specifically applying the hindsight bias jurors would regard defendants behaviours as consistent with experiences that led to their developing a negative stereotype about race or ethnicity, i.e. one group is lazy, another group is greedy and dishonest, a third group tends to be financially sharp.[455] Indeed the comparator jurisdictions agree with the Court of Appeal in R. v. Smith that jurors can rely on their past experiences, but if that past experience includes racism or stereotyping, that could cause a miscarriage of justice by permitting a juror with bias or prejudice to sit in judgment.[456]

Daly and Pattenden set forth at length the problems associated with the England and Wales system of determining juror bias:

> "The juror may be questioned but only after cause to challenge is shown. This means prima facie evidence of bias must already exist. Since the United Sates practice of questioning members of the venire to detect prejudice is not followed, this is unlikely unless the juror has been heard to make a racist remark or bears on his person

[454] T.M. Honess, M. Levi and E.A. Charman, *Juror Competence in Serious Frauds Since Roskill: A Research-based Assessment*, Journal of Financial Crime 17, 23 (2003).
[455] Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 Or. L. Rev. 61, 66.
[456] R. v. Smith [2003] EWCA Crim. 283,

> some visible sign of racism. Canadian courts have accepted survey evidence or taken judicial notice of local prejudice against visible racial minorities as prima facie evidence but there is no precedent for this in English law."[457]

Daly and Pattenden note that articles 6 and 14 of the ECHR offer protections to defendants that they will be tried by an impartial tribunal without regard to "race, colour, language, religion, national or social origin", but also strongly make the case that based on the Human Rights Act 1998, judicial preemptive questioning, majority verdicts discretion to discharge, discretion to warn, and post-verdict allegations procedures are not adequate protections for defendants against juror racism or prejudice.[458] The Canadian approach, which is set forth at length in Chapter 2, also permits courts to accept survey evidence of prejudice or to take judicial notice of it in certain communities, which would then precipitate voir dire.[459]

It is not a stretch to consider that concerns about race would extend to other crimes including serious frauds cases. Defendants of many ethnicities, colour, or religion must be concerned about the effect of race stereotyping on trial outcomes. If race is the finding factor in murder trial death penalty cases or other violent crimes, isn't it a fair inference that racial prejudice would infect a complex trial, particularly cases that involve international business people of all diverse backgrounds, races, and religions?

---

[457] Gillian Daly and Rosemary Pattendon, *Racial Bias and the English Criminal Trial Jury* [2005] 64 Cambridge Law Journal 678, 685.
[458] *Id* 687, 699.
[459] R. v. Williams (1998) 15 C.R. 1128, 123 C.C.C.3d 481.

As noted in Chapter 2 in England and Wales the defendant does not have the right to evaluate the jury's verdict to see if it was tainted by racism.[460]

Lord Steyn's call, in R. v. Mirza, for post verdict hearings on the injection of racism is certainly a more practical solution than Daly and Pattenden's solution of recording all jury deliberations and making the same available for limited review by the Court of Appeal based on a plausible allegation of racial bias infecting the jury deliberations.[461]

Conversely the absence of racial balance on juries has been a source of concern in England and Wales and Canada, as well as in the U.S.A. Several studies have urged different proposals to make racially balanced or representative juries in nations that function pursuant to random jury selection.[462] The Runciman Royal Commission on Criminal Justice in 1993 recommended that either the prosecution or the defense should be able to insist upon up to three jury members from the same ethnic minority as the accused or the victim. The Auld Report made general recommendations that there be ethnic and racial minorities on juries where race could potentially be a relevant factor in the case. In response to the Auld Report, lawyer's organizations proposed that upon application by the lawyers pretrial judges be empowered "to secure a panel with an appropriate ethnic mix from which the jury is to be drawn".[463]

In Canada minority aboriginal representation on criminal juries remains a problem:

---

[460] R. v. Mirza, [2004] U.K.H.L. 2.
[461] R. v. Mirza, *supra* note 461; Daly & Pattenden, *supra* note 458, at 703-705.
[462] The Auld Report, *supra* note 16, viscount Runciman, The royal Commission on Criminal Justice ch.8, ¶¶ 26-28 (HMSO 1993) at 133-134.
[463] The Criminal Courts Review Report – Comments from Lawyers Organizations, Department for Constitutional Affairs, Chapter 5 Juries, para 46, http//www.dca.gov.uk/criminal/auldcom//org; the Auld Report, *supra* note 660.

> "Despite the fact that aboriginal peoples were the accused in fifty-five percent of the cases, aboriginals served on only twenty-seven of the sixty-six jury trials and typically as only one of the six members."[464]

B. Summing Up

Sir Robin Auld in his review of the criminal justice system recommended that:

> The judge should no longer direct the jury on the law or sum up evidence in the detail that he does now.[465]

Indeed the Auld report recommends that the jury be free from any contact with the law and the judge function to filter the law from the jury, based on his belief that jury's are unable to comprehend complex legal and factual issues. This opinion mirrors the view of the Roskill report that juries are unable to comprehend. A 1993 Crown Court study found that jurors frequently had questions about the judge's charge, but were unaware that they could ask questions of the judge about the charge.[466]

The same study demonstrated that 33% of jurors polled felt that the judge's charge was tilted toward conviction or acquittal, almost equal toward the prosecution and the defense. The study found that the juries in a significant percentage either convicted or acquitted

---

[464] Neil Vidmar, *The Canadian Criminal Jury: Searching For A Middle Ground*, 62 Law and Contemporary Problems 141, 171 (1999).
[465] Auld Report, *supra* note 16, Chapter 11, 44.
[466] M. Zander and P. Henderson, Crown Court Study, Research Study No. 19 for the Royal Commission on Criminal Justice (1993) 32 percent of the jurors had questions about the judge's summing up, 27% did not ask.

based on the judge's perceived tilt.[467] Of course the case of the conviction of David Bentley in 1953, a miscarriage of justice occasioned by the trial judge summing up to the jury in which he virtually directed a verdict of conviction by noting that the jurors had title but to convict was famously overturned in 1998 with an opinion by Lord Bingham castigating the judicial directions to the jury.[468]

XI. Conclusion

Any effort to evaluate the fairness, effectiveness and efficiency of the jury system using statistical analysis as the sole standard is fraught with danger. Interviewing former jurors months or years after their deliberations leaves the interview subject to criticism, whether there is a qualitative or quantitative attempt to gauge the jurors' understanding of the Judge's legal instructions and the law under which the case was decided. Moreover, failing to take into account the nuances that each individual case presents is directly contrary to the notion that each case is tried on its individual merits.

Serious analysts of jury behavior make cogent arguments that jurors bring to the deliberative process their common sense and experience – and depending on whom they are that may differ and affect how facts are analyzed. That people from different races, socioeconomic groups and religions may view the same set of facts differently, drawing inferences that are not uniform and reaching different conclusions, is not per se an indication of bias or prejudice on the part of the juror, nor does it demonstrate a flawed outcome. Indeed, jurors are exhorted to use their "experience in life, your own intelligence,

[467] *Id* at 214-218.
[468] R. v. Bentley [1998] T.L.R. 492.

and every test you have found useful in your own life experience" to determine the credibility of witnesses or the weight given to evidence.[469]

Because judges and jurors respond differently to comparable situations suggests that a fair conclusion from the various forms of statistical analysis reviewed above is just that -- people do make decisions based in part on who they are. It is apparent that both elected and appointed judges make error and similarly elected appellate judges have a substantial record of reversal of those errors. While the high error rate is of concern, it is difficult to evaluate whether the mistake is in the interpretation of existing law or whether the error is actually the appellate court's correcting the trial court based on the latest evolution of death penalty jurisprudence.

The issues of race, complex jury instructions, and the reliability of juries are recurrent concerns in the comparator jurisdictions. Judicial participation either before the jury or in judge only trials is also the object of concern in the comparator jurisdictions. Chapters 2 and 3 demonstrate that both juries and judges are subject to some external influences and biases, even in the most extreme form of trial.

The next chapter will look at the more specific problems associated with serious fraud cases, explaining how corporations and corporate officers fare in jury trials, while exploring some of the criticisms and alternatives available to the justice system.

[469] Howard G. Leventhal and Budd G. Goodman, Charges to The Jury and Requests to Charge in A Criminal Case in New York (Il: Callaghan, 1988).

CHAPTER 4

CONSIDERING JURY CAPACITY IN COMPLEX CASES

I. Introduction

A series of arguments have been advanced to support either disenfranchising juries from hearing complex cases, retooling jury charges so that juries can better understand the complexities of the cases before them, or restructuring the jury pool to create a class of super jurors, highly educated and sophisticated and therefore better equipped to deal with the sophisticated details of serious fraud trial. This chapter will examine the major arguments regarding jury capacity in complex cases.

II. Unconstitutional Complexity and Issues of Jury Comprehension – Are Juries Up To the Task?

A. Jury Outcomes

Have juries demonstrated through outcomes that they are able to grasp complex fraud cases? Are the factual and legal details of a serious fraud trial so complex that the maze of detail and law thwart a fair jury verdict thereby giving rise to a judge only trial as the only mode of trial that can accord due process? This was the reasoning given by the proponents of judge only trials for certain serious fraud cases, as well as the rational given by a small number of American courts in directing a nonjury trial in complex cases. We will examine the question in England and Wales below looking specifically at the

Serious Fraud Office, a special agency established to prosecute such cases. America does not have an equivalent entity and thus, there is no readily available control source to rely upon for the statistical analysis of jury outcomes in major or serious fraud cases. There are a number of high profile prosecutions which offer useful anecdotal information into jury function.

However, outcomes of recent American trials brought against corporate leaders suggest that in some instances juries are able to achieve verdicts without proclaiming confusion or a hung jury. In fact, it is likely that jury incapacity is a less than persuasive argument for bench only trials in complex cases. Conversely it is also likely that in certain instances a judge only trial provokes more efficiency both administratively and legally, offering an option that high profile corporate defendants and their indicted officers might well consider.

For example, two American corporate chairs had different jury results. World Com CEO Bernard Ebbers was found guilty after a complex trial and Health South CEO Richard Scrushy was acquitted in a separate case of equally complex charges of financial fraud.[470] In the second largest alleged case of accounting fraud in American history, the so-called Cendant trials, the results were more mixed. A third CEO corporate leader, Kirk

[470] The Scrushy verdict was labeled "The Corporate O.J. Verdict" by Dean Jeffrey Sonnenfeld of the Yale Law School, asserting that the acquittal was against the weight of outstanding evidence particularly in light of Scrushy's defense that he knew nothing about the company finances and could not see what was transpiring in the corporation he founded. The Leherer Report/Public Broadcasting System, 5/23/06. The Ebbers verdict was affirmed by the Second Circuit Court of Appeals. Tom Perrotta *Circuit Affirms Ebbers Verdict*, New York Law Journal, July 31, 2006, at 1. In another unrelated trial Scrushy and the former governor of Alabama, Donald Seligman were convicted of various frauds. Kyle Whitmire, *Former Alabama Governor is Found Guilty of Bribery,* New York Times, June 30, 2006 at A14.

Shelton, the vice-chair of Cendant was convicted on all twelve counts of conspiracy, securities fraud, mail fraud, and wire fraud in January 2005 while the jury was deadlocked regarding the Chairman Walter A. Forbes. Forbes' second trial also ended in a hung jury on February 9, 2006. His third trial resulted in a conviction. The length of each trial is likely a factor in the outcome. The first trial extended over eight months. In the second trial the prosecution took four weeks to present its case. In the successful third trial the prosecution took three weeks to present their case offering some succor to those who argue in favor of brevity.[471] (As we will see in Chapter 9, England and Wales judges who try serious fraud cases argue for indictment pruning and brevity as a matter of both principle and trial tactic.) The foreman of the second jury (who is a maintenance technician) when interviewed post-trial stated regarding the complicated accounting testimony, "I was able to sort it out," despite the fact that the case ended in a hung jury.[472]

The foreman's analysis is consistent with the apparent long held public opinion reflected in the U.S.A. Poll results obtained in the 1990s by the National Law Journal/Lexis of 800 jurors in civil and criminal cases showed that a majority "said that even the most technical cases should be heard by lay juries – rebuffing those critics who claim that trials involving scientific complex issues call for "expert" juries".[473]

---

[471] Stacy Stowe *Chief Guilty At Cendant In Third Trial*, The New York Times, November 1, 2006, at C1, C4.

[472] Stacey Stowe, *A Second Mistrial Is Declared in Fraud Case Against the Former Chairman of Cendant,*, The New York Times, Fri, Feb. 12, 2006, C6.

[473] *The View From the Jury Box*, 15 National Law Journal, Feb. 22, 1993 at 25; This view is shared by Neil Vidmar who notes that jurors in the very complex medical malpractice trials only found for the plaintiff about 25% of the time and that other research has indicated that jury verdicts tend to agree with assessments by independent reviewers hired by insurance companies. Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, The Contingency Fee System, Juries, and Social Policy*, 38 Loy. L.A.L. Rev. 1217, 1235-1237 (2005).

The Enron corporate collapse is generally viewed to be the largest corporate fraud case in the world to date. The jury that tried the Enron Chairman of the Board and the CEO had little problem following complex proof. That jury tried the indictments of Kenneth Lay and Jeffrey Skilling, deliberating six days to find the two former corporate leaders of Enron guilty. Lay, the former chairman of the board, was found guilty of securities fraud (he lied to employees, credit rating agencies, and analysts alleging Enron was healthy when it was not); wire fraud (told this same story in a video conference in September, 2001 assuring them of a "great" third quarter performance while knowing that in mid-October there would be a massive loss and 1.2 billion dollar write down in shareholder equity), and mislead credit agencies with the same fact situation. Skilling, who was the President and C.E.O. was convicted of a conspiracy in which he gave false reports to the Securities and Exchange Commission and Wall Street Analysts; created raptors (four financial structures backed by Enron stock which were used to hedge inflated asset values) and keep hundreds of millions of dollars of Enron debt off the books. The jury found that Skilling knew that the raptors were wrongly treated as independent of Enron; committed wire fraud transfers; committed securities fraud, in that the 2000 and 2001 reports to the SEC were intentionally misleading as well as misleading to credit agencies; gave false statement to auditors; engaged in insider trading having sold $62.6 million of Enron stock when he learned the shares were inflated by the internal effort to cover up the company's true financial condition.[474]

[474] Alexi Barrionuevo, *2 Enron Chiefs are Convicted in Fraud and Conspiracy Trial*, The New York Times, May 26, 2005, at 1, C4-5; Bruce Nichols *The Jury Holds CEO's to Account*, May 26, 2005, The Dallas Morning News as carried by the Syracuse Post Standard, A-6.

The Skilling defense relied on the issue of complexity, maintaining that the Enron prosecution had wrongfully pursued complicated transactions which were difficult to understand but were legal, ordinary business practices which were being criminalized because of their complexity and because Enron had failed famously.[475] Post trial interviews with jurors reported that their decisions were based on the cumulative evidence, they did not accept the complexity argument as either rationale for the legality of the transactions or an excuse for the defendants, and concluded that there was criminal fraud and consequent culpability.[476]

The prosecution of Enron related cases resulted in sixteen guilty pleas, seven convictions, one outright acquittal, and a mixed verdict of some acquittals and a hung jury on other charges against five Enron defendants. To be more specific 5 juries in Enron cases including the Lay and Skilling trial, found the company's accounting firm guilty of obstruction of justice, a separate jury convicted five executives, one an Enron vice-president and four officers of Merrill Lynch, and acquitted one of fraud; a third jury was hung against five other Enron executives on certain accounting fraud charges and acquitted them of others.[477] From these results alone emerges evidence that juries gave the charges due deliberation, evaluated each case on the facts, and rendered mixed

---

[475] Alexi Barrionuevo, *supra* note 475, at A1, C4, Vikas Bajaj and Kyle Whitmire, *I Didn't Know, Did Not Sway Houston Jury*, New York Times, May 26, 2006, A1, C5.

[476] *Id.; see also* Jim Lehrer News Hour Report, May 25, 2006, PBS interview with Professor Samuel Beall (a former member of the Enron Task Force) who argued that this verdict vindicated the jury's ability to evaluate corporate conduct – "could corporate activity be structured at such an archaic level of activity that the legal system cannot sort it out – this verdict indicates yes, they can."

[477] NY Times.com/enron.

verdicts, finding some defendants not guilty and giving acquittals on some counts and convicting defendants on other counts.

The best example of juror capacity to understand a complex case is the indisputably main event in the scandal, the conviction on May 26, 2006 of Lay, the chairman of Enron, on ten counts of conspiracy, wire fraud, securities fraud, bank fraud and false statements and Skilling, the CEO, on nineteen counts of conspiracy, wire fraud, securities fraud, false statements, insider trading. Skilling was acquitted on nine counts of insider trading.

Little was left to doubt about the jury's collective thought process in arriving at the convictions. All twelve jurors and three alternates conducted a one-hour press conference immediately following rendering the verdict. By occupation the jurors were a dairy farmer, payroll manager, two engineers, a ship inspector, court clerk, personnel manager, retired sales assistant, dental hygienist, elementary school teacher, and elementary school principal. The testimony and attorney arguments had lasted 56 days and the jury had deliberated for five days "...they were shown thousands of pages of corporate documents and spread sheets; they took 27 boxes worth of evidence with them into the jury room where they deliberated."[478]

The jurors were selected in one day primarily by the trial judge, U.S. District Court Judge Simeon Lake, utilizing a fourteen page questionnaire. In their post trial interviews, they acknowledged (comparable to what experienced English trial judges say about serious

[478] Vikas Bajaj and Kyle Whitmire, *"I Didn't Know, Did Not Sway Houston Jury"*, New York Times, May 26, 2006, P2, C5.

fraud trials in their country) that this case ultimately turned on credibility.[479] After hearing from twenty-five prosecution witnesses and thirty-one defense witnesses including Skilling and Lay, the jury concluded that the dual defense theories that Enron fell not because of accounting fraud (the accounting was, according to the defense complex, but legitimate) but rather because of adverse publicity which created a devaluation of the stock were both without credibility:

> "The 12 jurors and three alternates ... said "they were persuaded by the volume of evidence the government presented and by Mr. Skilling's and Mr. Lay's own appearances on the stand, that the men had perpetuated a far reaching fraud by lying to investors and employees about Enron's performance."[480]

The case against Lay was the more difficult to bring and to prove because he was, a chair of the board, more removed from the day-to-day transactions:

> "Prosecutors eventually defined and pinned down Mr. Lay's misdeeds by focusing on what amounted to the most basic of childhood transgressions. After analyzing millions of pages of documents, deconstructing complex accounting mechanisms, unwinding complex trading transactions and interviewing scores of witnesses they found a theme that carried the day: Mr. Lay chose to lie – to his shareholders, his employees and his banks – and those lies were his crimes."[481]

---

[479] *Id,* .at C5.

[480] Alexi Barrionuevo, *2 Enron Chiefs are Convicted In Fraud and Conspiracy Trial,* New York Times, May 26, 2006, 1, C4.

[481] Alexi Barrionuevo and Kurt Eichenwald, *The Enron Case that Almost Wasn't,* The New York Times, June 4, 2006 B1, 7. *See also,* Kurt E. Eichenwald, *Conspiracy of Fools* (Broadway Books/Random House, 2005) Chapter 21.

> "And prosecutors ruled out insider trading and corporate looting indictments not because the jury would not understand these more complex theories, but rather because there was great doubt as to the sufficiency of the evidence as a matter of law."[482]

The case against Skilling was complicated by the defense which denied the actual existence of the financial losses Enron had incurred prior to his departure and defended as legal and consistent with existing accounting practices the very actions alleged as illegal in the indictments.[483] Under Skilling's contentions to the jury, when he left Enron months prior to Enron's collapse, the company was in relatively sound financial condition and had followed acceptable accounting practices. He argued to the jury that the collapse was not on his watch and was the result of a confluence of market events and bad publicity creating a loss of market confidence in the company thereby causing a rapid devaluation of the stock. The jurors in their verdict rejected Skilling's rationale entirely, convicting him on all of the accounting related counts of the indictment. In their post conviction explanation to the media, they made it clear that they not only found Skilling's defense to be incredible, they also found the accounting to be dishonest and believed that he had committed fraud. [484]

Or consider the fate of the previously mentioned Richard Scrushy, the former Chief Executive of the health care conglomerate Health South. Acquitted of fraud charges in 2005 in Birmingham Alabama, he was convicted in 2006 of bribing the Governor of Alabama Don E. Seigelman $500,000 in return for certificates of need for two hospitals.

---

[482] Barrionuevo and Eichenwald, *supra* note 481, B1, 7.
[483] Alexi Barrionuevo, *Ex-Enron Chief Defends Shift of Contracts*, New York Times, April 13, 2006, C5.
[484] Bajaj and Whitmire, *supra* note 478.

The trial was conducted for six weeks, with eleven days of difficult deliberation in which the jury twice claimed it was deadlocked, the foreman in a note to the judge claiming several jurors had been "lackadaisical" and had refused to deliberate. The jury rendered a verdict which found the former Governor guilty of conspiracy, bribery, mail fraud and obstruction of justice. The jury found Scrushy guilty of bribery, conspiracy and mail fraud. It acquitted Mr. Siegelman's former Chief of Staff and his former transportation director on charges they had participated in a racketeering scheme.

One observer in evaluating the jury's performance stated:

> "I think that we underestimated the jury's capacity to render verdict on a complex body of evidence... Perhaps the jury has voted to bring about a higher standard of government in Alabama."[485]

Lord Conrad Black, based on fifteen weeks of testimony by more than forty witnesses and the consideration of seven-hundred documentary exhibits, was convicted by a jury of obstruction of justice and three counts of mail fraud. He was acquitted on nine charges including mail fraud, wire fraud, racketeering, and tax fraud. The jury deliberated for twelve days before reaching its verdict, which also convicted Lord Black's three co-defendants on comparable charges.[486] The jury of nine men and three women included a real estate broker, an accountant, an engineer, a postal worker and a hair stylist.[487] Several of the jurors told the press that while they felt that racketeering charges with

---

[485] Kyle Whitmire, *Former Alabama Governor Is Found Guilty of Bribery*, New York Times, June 30, 2006, at A14 quoting William Stewart, emeritus professor of political science at the University of Alabama.

[486] Susan Berger, *A Spectator's View of the Weeks Courtroom Happenings*, CBC. http://www.cbc.com/news/background/blackcontad/fromthe-inside07016.html, July 16, 2007;

[487] Andrew Herrman's, *Jury 'Hearts Went Out' to 'St. Mark'*; http://www.suntimes.com/business/hillinger/469858, CTS-NWS-conrad16.articles.

which Black was charged were credible, there was not enough proof to convict. One of the jurors observed that although at the start of the trial she was confused, eventually "you begin to understand".[488]

It is well known that defendant behaviour during the pendency of the prosecution of a U.S. case can affect sentencing. For example the United States Second Circuit Court of Appeals acknowledged that other officers of World Com received light sentences, one defendant five years, and two defendants one year because they plead guilty and cooperated.[489] In the 1989 conspiracy and tax fraud post trial conviction of Paul A. Belgerian, the judge in sentencing Belgerian to four years advised the defendant he lengthened the term based on his testimony on cross examination that he did not know he was legally required to file a tax return.[490]

A major serious fraud trial involved the racketeering and corruption trial of former Governor George Ryan of Illinois. Ryan was found guilty of eighteen counts of racketeering and obstruction of justice after a nearly six month trial heard from 115 witnesses and large numbers of documents. The jury deliberated for ten days before finding that Ryan while in office as the Secretary of State of Illinois awarded licenses for bribes, gave contracts to contributors and quashed investigations into his office.[491]

---

[488] Associated Press, *Jurors in Black Case Speak Out,* Chicago Tribune Online Edition, http://www.chicagotribune.com/news/local/illinois/chi-ap-il-blacktrial-jurors, 1, 2023199.
[489] *Conviction of Ex World Com Chief is Upheld*, Associated Press, New York Times, July 29, 2006, C2.
[490] Alexi Barrionuevo, *Enron Prosecutors Aim to Rattle, Not Be Rattled*, New York Times, April 13, 2006, C1, 3.
[491] Natasha Korecki, Abdon Pallasch, Mark J. Konkol and Steve R. Warmbir, *Guilty on All Charges*, Chicago Sun-Times, http//www.suntimes.com/output/ryan/cst_nsw_ryan183.htm/.

Each of these trials, gleaned from the recent American headlines, show juries hard at work in complex cases, making decisions that appear to be reasoned and arrived at after careful consideration.

B. Unconstitutional Complexity

The factual details of a corporate criminal trial will likely involve corporate governance, accounting, banking and other complex areas which as we have observed above, some argue in America and England and Wales that lay juries are not capable of comprehending. In America the notion of unconstitutional complexity has been advanced, principally with regard to civil cases but with some application to criminal cases as well.[492] The definition of unconstitutional complexity has two branches: 1) the facts which form the basis of a criminal violation or a breach of civil duty are so complicated that when applied to the law the Defendant could not have possibly understood that there was a breach, and, 2) a jury could not because of complexity apply the law to the facts to allow a decision that would satisfy due process requirements.

The doctrine of unconstitutional complexity emerged in the late 20th century when several judicial decisions adopted the theory. According to one commentator, "Fortunately, courts have begun to reject pro jury arguments in cases of complexity", asserting that for example, the case of Las Vegas Sun, Inc. v. Summa Corp provided "an

[492] David M. Nocenti, *Complex Jury Trials, Due Process, and the Doctrine of Unconstitutional Complexity*, 18 Colum. J. L. & Soc. Probs 1, FN 1 (1983) in which the author argues that the U.S. Constitution's Fifth Amendment gives the Defendant the right to a competent decision maker, but that this right is trumped by the Sixth Amendment right to a jury trial, however "if the jury truly cannot decide rationally, however, then the doctrine of unconstitutional complexity must be invoked".

even greater indication of the declining value placed on the jury trial."[493] Nocenti notes that applications to the trial judge for a non-jury trial asserting unconstitutional complexity in civil cases have met with varied results.[494] More recent decisions appear to discredit the doctrine of unconstitutional complexity. Since 1977 at least five federal district courts and two federal courts of appeals have engaged in lengthy analyses while finding that there is the right to trial by jury in complex civil litigation.[495] The United States Supreme Court has held that jury trials were not appropriate for some cases, finding that judges, not juries, are better suited to find the acquired meaning of patent terms.[496]

Any recent trend toward unconstitutional complexity has been reversed however by other federal courts which have reached decisions in which they declined to apply the doctrine.[497] Advocates for the doctrine of unconstitutional complexity also cite Justice

---

[493] Matthew Forbes, *Juries and Jurors: Jurors On Trial: Constitutional Right versus Judicial Burden: An Analysis of Jury Effectiveness and Alternative Methods for Deciding Cases*, 48 Okla. L.Rev. 563, 573 (1995), *citing* Las Vegas Sun, Inc. v. Summa Corp, 610 F.2d 614 (9th Cir. 1979) *cert denied* 447 U.S. 906 (1980).

[494] David Nocenti, *supra* note 492, FN2, pg. 1-2.

[495] *See* In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (denying jury trial demand); *In re* U.S. Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979) (granting jury trial demand), *cert denied,* 446 U.S. 929 (1980); Zenith Radio Corp v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979) (granting jury trial demand), *rev' d sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 3d Cir. 1980); ILC Peripherals Leasing Corp., v. IBM Corp, 458 F. Supp. 423 (N.D. Cal. 1978) (denying jury trial demand), *aff'd on other grounds sub nom.* Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) (denying jury trial demand); Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977) (granting jury trial demand); *In re* U.S. Fin. Sec. Litig., 75 F.R.D. 702 (SD. Cal. 1977) (denying jury trial demand), *rev'd,* 609 F.2d 411 (8th Cir. 1979), *cert. denied,* 466 U.S. 929 (1980).

[496] Marksman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996).

[497] *See* Cotton v. Witco Chem. Corp., 651 F.2d 274 (5th Cir. 1981) (granting jury trial demand), *cert. denied,* 102 S. Ct. 1256 (1982); Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) (granting jury trial demand, *aff'd,* 434 U.S. 575 (1978); Fellows v. Medford Corp., 431 F.Supp. 199 (D. Or.

White's footnote in Ross v. Bernhard which observed that "practical abilities and limitations of juries" is a factor a court may examine in determining the scope of the Seventh Amendment.[498] While the U.S. Ninth Circuit Court of Appeals followed this reasoning, the Third Circuit Court of Appeals did not, but did acknowledge that unconstitutional complexity may require a bench trial in "exceptional cases".[499]

The use of constitutional complexity in Federal Criminal cases is more problematic. Although Singer v. U.S. upheld the requirement in Rule 23 of prosecutorial consent for a bench trial, the Supreme Court left open the use of judicial authority to overrule such an objection if the trial judge concludes that an impartial jury could not be obtained.[500] There is very little case law on this issue. In at least two cases the Appellate Courts have held that the trial Court did not abuse its discretion in declining to override the prosecutor's objection to a demand for a bench trial.[501] On the other hand, two trial courts have held that the complexity of a matter to be tried by a jury is a basis for the court to override a prosecutorial refusal to consent to trial by jury and granting defendant's request for a bench trial.[502] Thus, these several American courts have considered the opposite scenario from that posed in the debate in England and Wales

---

1977) (granting jury trial demand); Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y.1977) (granting jury trial demand).

[498] Singer v. U.S., 396 U.S 531, 538 N.10 (1970).

[499] Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 81 (2001); *In Re* Japanese Elec Prods Antitrust Litigation (supra); However, the Ross v. Bernhard footnote is seen as limited in application by later cases, see Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, U. Chi. Legal F. (1990), 583-584.

[500] Singer v. U.S., 380 U.S. 24 (1965) at 37-38; Rule 23 of the Federal Rules of Criminal Procedure.

[501] U.S. v. Gabriel, 125 F.2d 89, 94-95 (2d Cir. 1997); U.S. v. Clark, 943 F.2d. 775, 784 (7th Cir. 1991).

[502] U.S. v. Braunstein, 474 F. Supp. 1, 14 (D. N.J., 1979), U.S. v. Panteleakis, 422 F.Supp. 247, 249-50 (D. R.I., 1976).

about bench trials in complex criminal cases. In England and Wales the defense bar is fighting to maintain the jury trial while in these two U.S. cases the defense is seeking a bench trial and the prosecution is opposing the same. This is quite different from England and Wales, as we will see below, where the organized bar stridently opposed the implementation of 43 CJA 2003 and now the passage of Bill 6 of 2006-07.[503] However it should again be noted that both pieces of legislation are lopsided in that they do not give the defendant the opportunity to request the mode of trial. Moreover, unlike America where the Sixth Amendment to the U.S. Constitution protects the defendants absolute right to a jury trial, the England and Wales defendant could lose the right to a jury trial under both 43 C.J.A. 2003 or Bill 6 of 2006-07 (the present legislation pending in parliament that would permit judge only trials in serious fraud cases) even if objecting to a bench trial.

C. The Jury Capacity Debate in England and Wales – Are Bench Trials the Answer?

The debate in common law jurisdictions has been framed as essentially between the pragmatists who opine that jurors are incapable of competently handling complex trials and the principled advocates of the jury system who reject the claim of jury incompetence and dispute the existence of the legal right to take cases away from juries.[504] Nowhere are the battle lines more clearly drawn than in England and Wales. Section 43 of the

---

[503] Press Releases: Law Society of England and Wales, Preserve the Right to Jury Trial – Law Society Briefing – Law Reform and Legal Policy (6July 2005); Don't Abolish Juries in Frauds Trials (25 Nov. 2003); Government Climbs Down Over Abolishing Juries in Fraud Trials (3/14/06), www.lawsociety.org.uk.

[504] Michael Levi, *Blaming the Jury: Frauds on Trial* [1983] 10 Journal of Law and Society 257, 267-268.

Criminal Justice Act of 2003 (CJA 2003) provides in pertinent part that the prosecution may request a trial by judge due to complexity, a marked departure from the mandatory jury in indictable (major) criminal cases. The government achieved passage of the entire act, promising further consultation prior to the implementation of this controversial provision. The Bar Council and Law Society led the opposition to the implementation of this section of the Act of 2003, succeeded in obtaining a recent announcement by the government that it will not call forward (implement) this provision. 43 CJA 2003 notably grants the right to apply for a non jury trial only to the prosecution – the defendant cannot make an application for a non-jury mode of trial.

Thereafter in 2006, the then Attorney General, Lord Goldsmith renewed the effort in the form of Bill 6 of 2006-2007 which minimally reshuffled 43 C.J.A. 2003 providing that a High Court Judge may determine that a serious fraud case could be tried by judge only upon the application of the prosecution or apparently on the court's own motion. The legislation passed the House of Commons but failed to muster sufficient votes to achieve a second reading in the House of Lords, where it remains presently in legislative limbo.[505]

One indicator of jury capacity to comprehend and understand fraud cases is verdicts taken as compared to mistrials or failures to conclude the trial to verdict. The notion that serious frauds trials have resulted in a significant number of hung juries or mistrials, caused primarily by trial length resulting from case complexity, is not supported by recent statistics. The Serious Fraud Office is an investigating entity that instructs

[505] James Lumley, *U.K. Plans to Try Complex Fraud Cases Without Juries* (update 2), Bloomberg.com htpp//www.bloomberg.com (June 21, 2005); Bill 6 of 2006-07, *supra.*

prosecuting barristers. The Annual Reports from 2002-2006 of the Serious Fraud Office have documented only two cases ending in a mistrial (no verdict by the jury), out of 68 cases tried to verdict and each mistrial was caused by inability of the jury to agree on a verdict. There were no trials that collapsed prior to jury deliberations.[506] Even though England and Wales are (non unanimous) majority verdict jurisdictions, no trials prosecuted by the Serious Fraud Office were reported during 2002-2005 to have broken (mistrial) due to length.[507] The most in famous recent mistrial (broken trial), the Jubilee Line case (not a Serious Fraud Office prosecution) never reached the jury for verdict. Although the many reasons for the collapse is discussed at length in later chapters, the jury has been exonerated from any role in the case's failure by Crown Prosecution Service inspector General Stephen Woolers in a report of his investigation for the reasons(s) for the collapse of the case.[508] A subsequent article by Sally Lloyd-Bostock confirms this finding based on interviews with a number of the jurors in the case and a formal testing of their comprehension of the facts.[509] Likewise, a recent American study concludes that case complexity was rarely a reason for a hung jury.[510] In a subsequent

---

[506] Annual Reports of Serious Fraud Office, 2002-2006; see the 2004-2005 Annual Report. In the January 2004 trial of Richard John Spearman, the jury was unable to reach a verdict. At the second trial on June 4, 2004, he was convicted; Annual Report 2003-3004. In the trial of Leslie Rosenthal on June 26, 2003 the jury reported that it was unable to reach a verdict and the Judge ordered a not guilty verdict. In certain cases the Judge directed a verdict of not guilty during the proof. In others the Judge directed a not guilty verdict after all of the proof was in. These holdings are not mistrials by hung jury.

[507] *Id.*

[508] Stephen Wooler [2006] *Review of the Investigation and Criminal Proceeding Related to the Jubilee Line Case,* L.M. Crown Prosecution Service Inspectorate (HMCPS1) The case is discussed at length in Chapter 9.

[509] Sally Lloyd-Bostock [2007] *The Jubilee Line Jurors: Does their Experience Strengthen the Argument for Judge Only Trials in Long and Complex Cases?* Crim. L.R. 255.

[510] Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, G. Thomas Munsterman, *Are Hung Juries a Problem?* The National Center for State Courts (2002) at pg. 77. Valerie Hans and Neil Vidmar. *The American Jury at Twenty-Five Years,* 16 Law & Society, 1323, 1348 (1991) FN 109.

article, the same authors appear to clarify their findings, stating that "complexity may play a role in hung juries" and that jurors "on average in hung cases were more likely to say that it was difficult for other jurors and themselves to understand the evidence, the expert witnesses and the judge's instructions on the law" than their counterparts who reached a verdict.[511]

A recent practice protocol promulgated by the Court of Appeal (Criminal Division)[512] was prompted by the holding in a recent case that trial duration can compromise a just result and drain public resources.[513] The protocol provides insight into the thought process of the court and offers a menu of management alternatives for complex cases: For example, the Court urges that the police reduce the duration of defendant interviews, urges that only senior barristers try cases of more than eight weeks duration and recommends that the same trial judge to manage such a case "from cradle to grave.[514]

The Court regards case management hearings as an important mechanism for controlling the duration of the trial. During such a hearing, the defense and the prosecution are expected to set forth the issues in the case consistent with the protocol:

> "(b) There should then be a real dialogue between the Judge and all advocates for the purpose of identifying: (i)

---

[511] Valerie P. Hans, Paul L. Hannaford-Agor, Nicole L. Mott, and G. Thomas Munsterman, *The Hung Jury: "The American Jury's Insights and Contemporary Understanding*, 39 Crim. L. Bulletin 33, 44, (2003).
[512] Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases [2005] 2 All ER 429.
[513] R v. Jisl [2004] EWCA Crim. 696 at 113-121, [2004] All ER(D) 32 (Apr) at [113]-[121].
[514] Protocol for the Control and Management of Heavy Fraud and Other Complex Criminal Cases [2005] 2 All ER 429.

> the focus of the prosecution case, (ii) the common ground, (iii) the real issues in the case. . . ."[515]

The Court of Appeal suggests that collaboration is in the defendant's best interest because duration of the trial and confusion in presentation would cause "his good points to become lost in a welter of uncontroversial or irrelevant evidence". The Court also observes that stipulated facts (admissions or agreed facts) regarding uncontroversial matters should be proved by concise oral evidence, and timetabling (time limits on proof).[516]

The practice protocol also urges judicial intervention to reduce the number of charges brought.[517] In addition, the practice protocol advocates for early detailed expert disclosure so that areas of agreement may be achieved[518] and exhorts the judge to use time limits to control "prolix cross examination".[519] Thus under this rule a proactive managerial approach takes on potentially substantive dimensions because issues are to be narrowed. In the process each party should commence the trial with sufficient knowledge about their adversary's case so that a cogent, efficient plan for trial can be developed. Chapter 9 will detail the opinions of nine English trial judges about the conduct of serious fraud trials, the competency of the juries, and the effectiveness of the protocols.

---

[515] *Id* 3(2)(b).
[516] *Id* 3 (2)(c).
[517] This is not uniformly seen as desirable. The former Master of the Rolls Lord Donaldson decried this concept in the House of Lords arguing that it prevents the jury from hearing all of the alleged criminality and can affect sentencing.
[518] *Id.* 3 (e) VII.
[519] *Id.* 3 6 (v).

D. American Jury Critics and Defenders

American policy makers and academics have attempted to address the same issues reviewed above in England and Wales. For example, there were no correlations between hung jury rates and possible contributing factors such as population density, community diversity (measured by percent non-white) or community crime rates.[520] One study indicated that eighty-six percent of jurors surveyed felt that "no verdict was better than an uncertain one . . . however fourteen percent of the jurors believed that their over-riding 'duty' was to reach a decision regardless of their certainty about it."[521]

The criticisms of American jury function have resulted in proposals for retooling juries in complex cases.[522] The most striking is a proposal to have better educated jurors selected for complex cases, citing a number of studies supporting this position.[523]

---

[520] *Id.* at 26.

[521] Carol J. Mills and Wayne E. Bohannon, *Juror Characteristics: To What Extent are They Related to Jury Verdicts*, 64 Judicature 22, 29 (1980).

[522] Franklin Strier , *The Educated Jury: A Proposal for Complex Litigation*, 47 DePaul L. Rev. 49 (1997-1998).

[523] R R. Hastie, S. Penrod, & N. Pennington, Inside the Jury, 135-137 (Harvard U. Press 1983), 135-37, (showing that jurors with higher education had superior recall of the judge's instructions and of the facts of the case); James Marshall, Law and Psychology in Conflict. 59-100 (1980) (suggesting the superiority of college-educated jurors in greater and more accurate retention of detail); Robert P. Charrow & Vida R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1320 (1979) (finding that college-educated jurors performed better than non-college-educated jurors in ability to comprehend standard jury instructions); Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. Crim. Law198, 224 (1984) ("Jurors with greater experience and learning apparently comprehend and apply jury instructions better than those who are less experienced and/or less well educated."); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478, 483 (1976) stating that jurors with college education scored higher at comprehending the legal principles involved after receiving jury instructions than those without college experience); F. Stodtbeck et al., *Social Status in Jury Deliberations*, 22 Amer. Soc. Rev. 713 (1957) (stating that education and occupation are correlates of juror competence); ABA Report, supra note 25, at 25 (finding less educated jurors experienced greater difficulty with key factual and legal issues in four complex cases).

There is a body of research in support of this notion that the deliberating jury encounters significant problems arriving at a decision in complex cases.[524] It is not surprising that by virtue of trial complexity, decision making is likely to be difficult. And as this is explored elsewhere, the superiority of judicial verdicts in complex cases is difficult to demonstrate in part because Judges function under different rules which make their decision making less constricted by the rules of evidence and subject to more lenient appellate scrutiny.

Hans, et al utilizing experimental jurors found based on comprehension tests that solid majorities of jurors are basically competent in handling the biological elements in expert evidence about mtDNA.[525]

Hans and colleagues do suggest that educating jurors about the science before the commencement of the trial and the use of more educated jurors would increase jury comprehension.

---

[524] Streier, *supra* note 522, at N. 25 citing Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 Law & Soc. Rev. 123, 149 (1980-81) (describing errors in judgment resulting from faulty heuristics people tend to use in order to integrate complex information); William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 Law & Contemp. Prob., Autumn 1989, at 9, 24-41 (citing the different types of errors jurors make in interpreting statistical evidence); Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1334 (1971) (arguing that laypersons overemphasize mathematical evidence); Jury Competence in Complex Cases, A.B.A. Special Comm. On Jury Comprehension 25 (1989) [hereinafter, ABA Report] (investigating jury functioning in four complex cases).

[525] Valerie P. Hans, David H. Kaye, Judge B. Michael Dann, Erin J. Farley, and Stephanie Albertson, *Science in the Jury Box: Jurors' Views and Understanding of Mitochondrial DNA Evidence*, p. 34, Cornell Law School Research Paper No. 07-021. http://ssrn.com/abstract=1025582.

In defense of jury decision making, Vidmar et al., found in 1997 that criminal conviction rates in Federal Courts had increased since 1945, thereby refuting the suggestion that jury confusion may result in leniency.[526] Vidmar et al., also report that the number of trials increased in California from 1980-1981 but the conviction rate remained the same and that in New York conviction rates (and the number of jury trials) remained constant from 1985 through 1995, with a slight upturn in convictions between 1992 and 1995.[527] Vidmar in 1994 reviewed a series of studies of juror performance in complex civil cases, concluding that juror failure was less attributable to the complexity of the facts than to procedural failures, failures by the judge and attorneys, or outright confusing expert testimony. These are the parallel to conclusions reached in England and Wales with regard to the collapse of the Jubilee line prosecutions.[528] Vidmar also cites three studies of medical malpractice case verdicts which he asserts confirm competent juror function in this type of complex civil case.[529] Heuer and Penrod find that judges and juries decide cases perceived to be complex the same as juries in most instances.[530]

VII. Conclusion

The foregoing suggests that there is less than a compelling argument that jury comprehension of serious fraud cases imperils the achievement of justice either in form

---

[526] N. Vidmar, S. Beale, M. Rose and L. Donnelly. *Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data*, 80 Judicature (1996) 286, 287. In England and Wales, during the House of Lords debate on CJA 2003, the high conviction in frauds cases caused one experienced Lord to argue that perhaps jurors are giving prosecutors convictions because they are unable to comprehend the complexities of the case.

[527] *Id.*, pg. 289.

[528] Sally Lloyd-Bostock, *Jubilee Line Jurors, supra* note 509.

[529] Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific Medical Issues? Some Data from Medical Malpractice*, 43 Emory L. J. 885, 905-909 (1994).

[530] Larry Heuer and Steven Penrod, *Trial Complexity, A Field Investigation of Its Meaning and Its Effects*, 18 Law & Hum. Behav. 29 48 (1994).

or substance. Indeed despite the many assaults on jury integrity we have seen in preceding chapters the American juries have competently rendered the ultimate complex verdict, the death sentence, and that a variety of external or extra-evidentiary factors that may threaten jury integrity do not appear to be prevalent in any of the comparator jurisdictions.

A modification of the Federal Rules of Criminal Procedure to allow the defendant to choose a judge only trial would permit a corporate defendant (or any defendant) to opt for a judge only trial without the approval of the prosecutor, the same right that is accorded to all defendants in States like New York State.[531] Granting this mode of trial option would accord any defendant a potentially prompt, substantially less expensive trial. For a corporate defendant, it may mean the difference between economic survival and bankruptcy. The prosecution of Kenneth Lay offers some insight. Pursuant to "an unusual compromise" the trial judge with the parties' consent broke off from the charges against Lay four bank frauds charges, "in part because of the technical nature of the charges" and tried these by bench trial while the jury was deliberating fraud allegations against Lay and Jeffrey Skilling. This arrangement resulted in a shortened, truncated bench trial in which the judge exhorted the lawyers to keep moving.[532]

Solving the problem in England and Wales is more complex given the tradition that only juries hear the most serious offenses (indictable). Criminal Justice Act 2003 nor Bill 6 of

[531] N.Y. Civil Practice Law §§ 260.10, 320.10, (McKinneys, 2005).

[532] Vikas Bajaj, *A 2nd Criminal Trial Begins for Former Enron Chief*, The New York Times, May 19, 2006, at C4. On May 25, 2006, immediately after the jury verdict, the Judge found Lay guilty of four counts of bank fraud, the non-jury trial was completed in the six days the jury deliberated.

2006-07 give mode of trial choices to the defendant. This is perhaps the proper time to modify the approach in England and Wales to permit the defendant to choose the mode of trial in indictable *offenses*, thereby allowing a High Court Judge to be the trier of fact in complex cases where the defendant so chooses.

The next several chapters will examine in detail the law of modes of trial choices, how mode of trial decisions are made in New York and California and the impact of those decisions, as well as the evidentiary character of a bench versus jury trial, concluding with the view of New York State judges and lawyers and English jurists regarding many of these issues.

CHAPTER 5

THE PRESENT LAW OF MODE OF TRIAL CHOICE IN COMPLEX CRIMINAL CASES AS COLOURED BY PROPOSED REFORMS

I. Introduction

Trial by judge has emerged as the preferred mode of trial for complex trials in the opinion of a significant group of commentators in common law nations.[533]

Juries also have ardent defenders, armed with supporting data such as a detailed sociological study of actual jurors which concluded that jurors comprehended the law, understood the facts, and only departed from the judge's instructions as a matter of conscious judgment.[534]

As we have already seen in Chapter Two, the role of the jury and how it functions in the comparator countries is based in part on the legal culture. For instance, according to two leading commentators, there are fundamental distinctions regarding the role of the jury:

> "American juries still have more power and discretion than English and Canadian juries. American juries play an important role in deciding whether or not the death penalty should be given to persons convicted of first degree murder. Additionally, thirteen states give the jury the authority to prescribe the length of sentence for defendants convicted of other serious crimes; when English and Canadian lawyers and judges are asked about the American

[533] John Jackson & Sean Doran, Judge Without Jury, Diplock Trials in the Adversary System 1-2 (Oxford U. Press 1995).
[534] Martha Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 Law and Society Review, 781-798 (1979).

> Judicial System, they express disapproval concerning the powers given to American juries. In their countries, juries are far more subservient to judges. Judges alone pronounce the law and set sentences."[535]

The judge/jury relationship in the comparator countries is not precisely the same because cultural preferences have influenced the statutory and common law as well as national constitutions. America's constitutional preference for juries is explained as follows:

> ". . . The American people are still afraid of delegating too much power to one individual, a fear which has lived at least as long as our Constitution. A judge with the sole ability to adjudicate disputes is seen as a potentially deadly cancer which may grow and spread throughout the entire system of justice. Thus, we are willing to live with the widespread ills of a jury system, which we perceive to be at least nonfatal."[536]

Changes in the English civil justice system which eliminated juries in most civil cases, the long term use of so-called judge only Diplock trials in Northern Ireland, and the more recurrent parliamentary efforts (which are examined in this Chapter) to permit bench trials in certain serious fraud cases, may reflect a more diminished commitment in England and Wales to the jury trial than that held by the Americans or the Canadians. It must be acknowledged that the present institutional suspicion of the English jury is not a recent development, as Langbein observes:

---

[535] Valerie P. Hans and Neil Vidmar; Judging the Jury, 31-32 (New York, Plenium Press, 1986).
[536] Matthew Forbes, *Juries and Jurors: Jurors on Trial: Constitutional Right versus Judicial Burden: An Analysis of Jury Effectiveness and Alternative Methods for Deciding Cases*, 48 Okla L. Rev. 563, 583 (1995).

> "Because of the grave risks of error and bias that are inherent in using such decision makers, the common law courts have never left juries to their own devices. Rather, the judges have undertaken to guide and oversee the work of the jury."[537]

Despite the prominence of the jury in American and Canadian legal culture and lore, the judicial role in the three comparator countries has expanded. For example, the judge's gate keeping role regarding the admissibility of novel expert testimony has greatly expanded particularly in the U.S.A. This trend is also clearly demonstrated in England and Wales in the loosening rules of evidence such as hearsay which grant greater judicial discretion. Likewise the increased emphasis on judicial pretrial and intra-administrative control of all trials in all three countries, and in particular complex trials, highlight the ascendance of the judge in complex cases.

The ultimate judicial role, trier of fact, as well as the decider of law, remains possible in two of the three jurisdictions for serious fraud cases.

This chapter will explore the trends and exceptions regarding mode of trial, examining how the choice is made and discussing alternatives. This chapter will also review the mode of trial options in the comparator countries, will examine the various proposals to modify or change the mode of trial selection process and will weigh the constitutional legislative and judicial policy considerations at play in this discussion.

---

[537] John H. Langbein, The Origins of Adversary Criminal Trials, 321 (Oxford, 2003).

Given the trends briefly reviewed in this introduction, the method by which the mode of trial is selected requires careful consideration.

II. Mode of Trial Debate In England and Wales

As noted in Chapter 4, the emergence of trial by judge as a preferred mode of trial in England and Wales is demonstrated both by the long tenure of judge only Diplock Trials in Northern Ireland as well as parliament's passage of Sections 42 and 43 of the Criminal Justice Act, 2003 (CJA 2003) (which have not been called forward to date), which authorizes judge only trials in complex cases pursuant to an application by the prosecution only and the order of the Chief Justice.[538] To briefly recite the history covered in the prior chapter, the Blair government, in a tactical compromise during the Parliamentary debate on CJA 2003, agreed that the implementation of Section 42 and 43 would require further Parliamentary action if the entire bill was passed.[539] An attempt to obtain further approval was subsequently blocked in the House of Lords, resulting in the Government agreeing to not call the legislation forward. In late 2006 a new bill was sponsored which would permit a High Court Judge to determine that a serious frauds case should be permitted to order a judge only trial.[540] That legislation passed the House of

---

[538] As noted in earlier chapters, Diplock Trials in Northern Ireland are Judge-only trials which will be discussed at length *infra*.

[539] Official Report, Commons (20/11/03; Cal 1027-28) (Statement of Mr. Blunkett). The promise was made by Mr. Blunkett, then the Home Secretary, when asked if the bill passed, was he representing that there "will not be any serious fraud trial by a single Judge in England and Wales?" His response was: "I am prepared to give that undertaking. It is part of the agreement that we will retain the clause, but move forward towards looking at the alternative, solutions . . . That safeguard is appropriate. I give a finding that we will follow that agreement." This exchange is the undertaking that further parliamentary action would be required to bring into force §43 Criminal Justice Act 2003.

[540] The Trial by Judge Provisions, 43 CJA 2003 have not been brought forward and an effort to pass amended legislation to implement judge only trials has passed the House of Commons but failed on second reading in the House of Lords. *See also,* City & Financial,

Commons but failed to achieve a second reading in the House of Lords.[541] Both attempts to create trial by judge only in serious fraud cases have proposed the judiciary as the sole decision maker as to the mode of trial. Commencing early in the Blair government's advocacy of judge only trials, the defendant was permitted the choice of mode of trial, a concept that was abandoned with time, as we will see later in this chapter.

III. Overview of Mode of Trial Issues in the U.S. and Canada

Chapter 4 addressed specific complaints about juries in complex cases in the U.S. Despite the over two century existence of the Sixth and Seventh Amendments to the U.S. Constitution which establish the right to trial by jury in criminal and civil cases, the American jury is likewise the object of criticism in all types of cases. Consider Heuer and Penrod's opening paragraph of their investigation of the very definition of "trial complexity":

> "The jury has often been accused of being unfit to render fair and rational decisions in complex litigation. Though such criticism has tended to focus on the civil jury, the criminal jury has not been immune. Among the critics, for example, is Dean Griswold of the Harvard Law School, who said, "The jury trial is the apotheosis of the amateur." "Why should anyone think that 12 persons brought in from the street, selected for their lack of general ability, should have any special capacity for deciding controversies between persons?" (citations omitted). In their summary of the jury competence dispute, Hans and Vidmar quote the English scholar Glanville Williams: 'It is an

---

http://www.cityandfinancial.com (last visited 22 Mar. 2006). The new bill, Bill 6 of 2006-07 (The Fraud Trials Without a Jury) Bill 2006-07 passed Commons but on 3/20/07 a wrecking amendment caused the House of Lords to delay its second reading for six months.

[541] The implications of the ongoing parliamentary debate and the practical implications of the issues raised both by 43 C.J.A. 2003 and Bill 6 will be examined in Chapter 9, which considers the opinions of nine English trial judges regarding the proposed legislation and the present status of serious fraud trials.

> understatement to describe a jury . . . as a group of twelve men of average ignorance.'"[542]

Comparing jury trials with judge only trials in an effort to evaluate mode of trial choices and policies is a nuanced exercise. The motives of the parties when they choose a judge only trial must be examined. There must be a careful factoring of the impact of intra-trial events on verdicts in order to test the premise that judicial verdicts are superior to jury verdicts. In certain American jurisdictions as well as in Canada there is a degree of self-selection because the defendant is empowered when confronted with the most serious criminal allegations (no such option is permitted in England and Wales) to choose a judge only mode of trial. Because the very selection by the defendant of the option of a judge-only trial is a tactical decision, a statistical comparison of outcomes may not be a reliable exercise. For example, some bench trials can be a trial in form rather than in substance, a mechanism for the guilty defendant to avoid a guilty plea ("a slow plea") while achieving sentencing leniency.[543] Even when hotly contested, bench trials can become a different version of an adversary proceeding, undercut by judicial interference in the form of invasive interrogation with different evidentiary rules and broader standards for appellate review than jury trials.[544] Therefore any conclusions based on a comparison of trial outcomes in judge only cases as compared to jury trials should be skeptically utilized.

---

[542] Larry Heuer & Steven Penrod, *Trial Complexity, A Field investigation of Its Meaning and Its Effects*, 18 Law and Hum. Behav. 29 at p. 29 (1994) citing Valerie Hans and Neil Vidmar, Judging the Jury (New York Plennium Press 1986) at 114.; *see also* Jerome Frank, Law and The Modern Mind 186 (Anchor Books 6th ed 1963) assailing juries as poor fact finders, ignorant and prejudiced and unable to follow complex legal rules.

[543] Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev 1037 (1984).

[544] Jackson and Doran, *supra* note 533.

IV. Comparing Rates of Conviction and Acquittal in Judge Versus Jury Trials

It is logically perilous for many reasons to draw the conclusion that one mode of trial is more just and/or more efficient than the other from a comparison of conviction/acquittal rates between bench and jury trials. Record keeping may vary and in exercising the choice of the mode of trial, the strategic objective of choosing a bench trial may be very different from the strategic objective in selecting a jury trial. It is useful to begin the analysis by examining an illustrative anomaly in bench trials - the City of Philadelphia practice which was followed in the 1980s which offered bench trials in lieu of jury pleas. Referred to in some jurisdictions as a "slow plea", a study of Philadelphia bench trials concluded that these were actually very brief (on average 80 minutes per trial) but real trials which still had a reasonable rate of acquittal. Shulhofer found a twenty percent acquittal rate in bench trials of this type in Philadelphia – with no comparative statistic given for jury trials. To further demonstrate the problems posed by statistical comparisons of this type, the Schulhofer statistical conclusions were at variance with the official statistics for that time frame which show a thirty percent acquittal rate in bench trials in same Court. The official statistics regarding the bench trial acquittal rate exceeded the jury trial acquittal rate but the official explanation was that there were different record keeping practices which, for example, recorded an acquittal where Defendant was found not guilty on one charge but found guilty on another charge upon the conclusion of the same trial.[545] This example illustrates that jury trial as compared

[545] Stephen J. Schulhofer, *Is Plea Bargaining Inevitable*? 97 Harvard L. Rev., 1037 at 1087 (1984). There is a 20% acquittal rate for bench trials and 25% rate of conviction on lesser charges only. Table V, *supra* at page 1080. The official statistics show a 30% acquittal rate in bench trials, higher than the jury acquittal rate because record keeping anomalies, i.e. showing a acquittal where Defendant found not guilty on one charge but found guilty on another charge on conclusion of the same trial, at 1076.

to bench trial outcomes are only truly comparable if there are similar protocols followed in assembling the data. The how or why of case selection for mode of trial is an important factor. The defendant's motivation for choosing the bench mode of trial may be instructive for comparative purposes. For example, the defendant according to Schulhofer in most cases opted for a "slow plea" or truncated factual trial before a judge to achieve not an acquittal but rather a lesser sentence. This underlying objective jades comparing statistical outcomes (i.e. conviction versus acquittal) with jury trials, where the defendant's primary objective is presumably to achieve a verdict of acquittal.[546]

Kalven and Ziesel have utilized a more accurate approach for evaluating jury function. Rather than comparing the overall statistical outcomes of actual trials, Kalven and Ziesel measured judge/jury disagreement by utilizing a standard questionnaire to poll judge/jury disagreement in 3576 jury trials, exploring the actual trial judge's opinion of the jury's verdict in each of these trials. They found that the trial judge agreed with the jury's verdict in 75.4% of trials.[547] A more recent smaller American study modeled after the Kalven and Zeisel study found comparable judicial agreement with jury results.[548] A

---

[546] Rocco LaDuca, *Judge Finds Utican Guilty in Fatal Crash – Was Driving Drunk in Accident that Killed 22 Year Old Woman*, Utica Observer Dispatch, May 26, 2006 B1. An anecdotal example is the case of Irfan Derrisevic (the defendant) who was accused of reckless manslaughter, a crime carrying a fifteen year sentence. The Defendant refused a breathalyzer test and his blood test two hours after the accident was slightly within legal limits. The testimony at trial was that based on those levels he was over the legal level for alcohol in his blood at the time of the accident. He opted for a bench trial while accused of reckless manslaughter for killing one person and maiming another while driving under the influence of alcohol. He was also charged with other lesser manslaughter and assault charges. He chose a bench trial in part because his level of intoxication was low. He was convicted by the judge of the lesser charges and thus will face not more than seven years of incarceration.

[547] Harry Kalven, Jr., and Hans Zeisel, The American Jury, pg. 56 (1966).

[548] Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab, and Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 Journal of Emp. Legal Stud.

comment on the Kalven and Zeisel findings observes that the rate of agreement between judge and jury is impressive:

> "... (it is) better than the rate of agreement between scientists doing peer review, employment interviewers ranking applicants and psychiatrists and physicians diagnosing patients and almost as good as the 79% or 80% rate of agreement between Judges making sentencing decisions in an experimental setting."[549]

In an attempt to further test that statistic, this study conducted a survey of all New York State judges who preside over jury trials. Sixty-five percent and sixty-three percent of the judges reported that of the trials before them they agreed with the juries verdict respectively in civil and criminal cases seventy-five percent of the time or greater.[550] By contrast fifty percent of the attorneys surveyed agreed with bench and jury verdicts in cases they tried.[551]

The jury/judge agreement rate is particularly impressive because juries are deliberative bodies with multiple opinions converging into one verdict while judges alone are sole decision makers. The method utilized by Kalven and Zeisel is also highly persuasive because the Judge is commenting on the jury's final determination in a case in which

---

171 (2005). In a smaller study with a less broad based sample the authors find comparable judge/jury agreement and conclude that Judges tend to convict more than juries, but not due to case complexity, at 204.

[549] Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1153 (1992), citing Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 Law & Contemp. Probs 243 (1988).

[550] Chapter Eight, *infra*, discusses the specifics of the study sample and findings. The Judicial Questionnaire used is Annex A.

[551] *Id.* The Attorney Questionnaire that was administered for this study is Annex B.

each heard the same proof, removing the nuances and caveats resulting from comparing actual verdicts by a judge versus jury in unrelated cases which always have dissimilar facts. The obvious problem with this compared opinion regarding outcome is the dynamic of both the compromise verdict and the hung jury. It may be helpful to know the number of votes and the ultimate rationale of the compromise to aid the judge/jury agreement factor. If the majority of jurors agreed with the judge but selected compromise over mistrial, that knowledge might enhance the outside observer's comfort level that the jury understood the case, had different conclusions and ultimately reached a compromise verdict. The rate of agreement found by Kelvin and Zeisel is also impressive because juries in the U.S.A., England and Wales, and Canada can and on occasion do fail to reach a verdict because of deadlock. It is unlikely that a judge will ever agree with deadlock as a trial result, consequently judicial agreement with jury rendered verdicts is likely a higher percentage than is reported in the literature.

Comparing statistical outcomes can also offer some surprises. For example, reported outcomes of criminal cases terminating in all U.S. District Courts from 1995 to 2003 show that while juries acquitted 15 percent of the defendants, judge's acquitted 46% of the Defendants tried in a judge only trial.[552] California juries from 1980-81 through 1994-95 had a conviction rate of 82.1 percent, while New York State from 1986-1995 had a jury conviction rate of 72.3 percent.[553] Hannaford-Agor, et al in a survey of the

[552] *See* Federal Justice Statistics Database, the U.S. Government, (2003).
[553] Neil Vidmar, Sara Sun Berle, Mary Rose, and Laura F. Donnelly, *Should We Rush to Reform the Criminal Jury?*, 80 Judicature, 286, 289 (1997). The authors did not compare acquittal rates by bench trials, however, they did recite a study which found Judge acquittal rates in DWI cases had increased compared to 1958 but jury convictions remained the same. Citing Rebecca

thirty largest American counties found that judges convicted in 76.4 percent of the cases but acquitted in 23.6 percent as compared to juries convicting in 71 percent, acquitting in 21.7 percent with a 6.2 percent hung jury and 4 percent other mistrial rates.[554]

In England and Wales, as we will see below, the acquittal rate is much higher before juries in indictable cases than before lay magistrates in either way or non-indictable offenses. However, Wasik asserts that the procedural differences between the forums again make comparisons difficult.[555] Moreover, because majority verdicts are not permitted in England and Wales, outcomes are also more difficult to compare with the U.S. and Canada, which are unanimous verdict jurisdictions.

Canada has experienced outcomes similar to those reported in the U.S. For example a government study of statistics in selected Canadian provinces and territories in 2003/04 demonstrated that "found guilty" rates in Superior Court, a venue in which more serious cases were heard by a jury, were "somewhat lower than for a provincial court case in the same jurisdiction", where the judge is the more likely trier of fact.[556] The explanation

---

Bromley, *Jury Leniency in Drinking and Driving Cases, Has it Changed?* 20 Law & Psychology Rev. 27 (1995).

[554] Paula Hannaford-Agor, et al, *Are Hung Juries a Problem?* The National Center for State Courts (2002) pg. 20.

[555] Martin Wasik, *Magistrates: Knowledge of Previous Convictions*, [1996] Crim. L. R. 851. Wasik notes that in summary trials before lay magistrates that the defendant is frequently unrepresented or has an inexperienced solicitor, the defendant's case frequently consists only of his/her testimony and the evidential issues are much less sophisticated than in Crown Court, where indictable offenses are tried.

[556] Juristat, Canadian Centre for Justice Statistics, Statistics Canada [2003-04] Catalog No. 85-002 Exp. Vol. 24, No. 12, pg. 9, The found guilty rate in provincial court was 58% as compared to 47% in Crown Court – the acquittal rate in Crown Court is 15% as compared to 2% in provincial Court. Canadian jury verdicts must be unanimous.

offered of the outcomes in Magistrates Court in England and Wales is comparable to Wasik's analysis:

> "The higher acquittal rate in Superior Court is based on proof problems associated with more complex cases as well as the number of charges, the availability of witnesses, the complexity of the case, and by implication the sophistication of defense counsel".[557]

A recent study comparing the trial conviction rate of bench versus jury trials in United States District Courts demonstrates that the conviction/acquittal rates may assist lawyers/solicitors in practical decision making, but are not helpful guideposts for evaluating the quality of comparative justice or fairness. The study found that the jury trial conviction rate was 84% and a bench trial conviction rate was 55%.[558] Leipold engaged in an intensive effort to evaluate this huge variation in outcome, only to arrive at informed but speculative conclusions but no definitive findings. His notion was that the type of case selected for trial by judge alone had diminished prosecutorial intensity because of the subject matter (like public order trials in England and Wales Magistrates Courts) which in turn made bench acquittals more likely. In fact there is a high percentage of misdemeanor cases encompassed in the statistics. Based on those variations, Leipold rejects the notion that jurors are over and judges are under convicting. He also opines in the article that Federal District Court judges, appalled at the severe sentencing guidelines imposed by Congress, chose to acquit at bench trials rather than be

---

[557] *Id.* at 9.

[558] Andrew D. Leipold, *Why are Federal Judges So Acquittal Prone?*, 83 Wash. U. L. Q. 151 (2005). The average conviction rate for juries since 1946 is 75% in all Federal cases, increasing to 85% in the last ten years. The average conviction rate for Federal judges in all criminal cases since 1946 is also 75%, but the rate for the first ten years, 1946-1955, the rate was 85% where in the last ten years, the rate of conviction is 54%. Pg. 164.

compelled by law to impose mandatory sentences pursuant to statutory guidelines which many of them view as harsh and disproportionate.[559] He further opines that each case which becomes a bench trial in Federal Court has factual or legal elements which draw the parties to a trial by judge rendering the absolute statistical comparison uninstructive by virtue of the self selection process.[560]

Mindful of the pitfalls associated with merely utilizing conviction and acquittal rates to compare judge and jury, a more detailed analysis of why a judge or jury is selected may assist in evaluating the trial process for each mode of trial as well as the outcomes.

V. Choice of Mode of Trial – When, How and Why?

The election of the mode of trial, where the opportunity to choose exists, is an important threshold consideration for both the prosecution and defense in the comparator jurisdictions. For the analysis in this chapter to be balanced, an examination of the rational behind the choice of trial by judge only or jury is required.

In the comparator jurisdictions, the defendant is accorded some choice in certain American and Canadian jurisdictions. Presently there is no opportunity to choose complex serious frauds trials or any other indictable offense in England and Wales -- all

[559] *Id.*, at 213-214. At the time of this study mandatory sentences, later declared unconstitutional for most crimes were required by statute.
[560] *Id.*, at 214, referencing a survey by a Federal Judge who found that other Federal Judges selectively altered the standard of proof from a preponderance of the evidence to a higher standard in sentencing proceedings.

such offenses are required to be tried by a jury.[561] Only in either way offenses (less serious crimes) can the defendant choose trial by jury or judges (lay magistrates). The magistrates may also on their own commit the case to Crown Court based on guidelines set forth in the Magistrates Court Act 1980.[562]

In certain U.S.A. jurisdictions, and selected Canadian Courts the defendant may choose a judge-only trial for major crimes but with significant caveats. In the U.S. District Courts and California state courts, the parties may agree to a bench trial, otherwise without such an agreement the trial will be by jury. In England and Wales, the trial of an indictable offense must be by jury but other intermediate offenses or either-way offenses can be tried by Magistrate Court or a Crown Court jury at the election of the defendant. The following is a more detailed explanation of the present status of mode of trial selection, looking first at Diplock trials, an international bellweather for the efficacy of judge-only trials in common law jurisdictions.

A. Diplock Trials

The so-called Diplock trials have cast a long shadow over the comparator jurisdictions.[563] The judge only trials were named after Lord Diplock, who after study proposed non-jury trials for terrorist related crimes in Northern Ireland in response to the concern that jurors could not be expected to fairly try alleged terrorists because of terrorist intimidation. While Diplock trials were never in effect in England and Wales, they were the legislative

[561] Part II of the Criminal Law Act1977; §49 Criminal Procedure and Investigations Act 1996.
[562] Pt. II of the Criminal Law Act 1977; Magistrates Court Act 1980 §19.
[563] John Jackson and Sean Doran, Judge Without Jury, *supra* 13, "From a constitutional perspective, Northern Ireland has been described as a kind of laboratory in which the strengths and weaknesses of different models of practice may be gauged".

work product of the United Kingdom Parliament, consequently their existence has helped to frame the mode of trial debate in England and Wales throughout the last thirty-five years. From their inception in 1973 in Northern Ireland, Diplock trials became a major bench mark for mandatory non-jury criminal trials, creating a presumption against trial by jury for a select category of accused.[564] Under the Diplock rules the Attorney General for Northern Ireland decides if a jury trial will occur in each case if the crime is a statutorily scheduled offense.[565] To further explain, if the crime is a scheduled offense it is presumed to be non-jury unless the Attorney General for Northern Ireland deschedules the specific crime by certification (although certain crimes such as burglary or robbery, or using an explosive or firearm, are not subject to descheduling).[566]

The decision to deschedule the specific crime is in the Attorney General's discretion, based on the described statutory finding that criminal activity of the accused is not part of the emergency or have no terrorist connection.[567]

Given the cumbersome mechanism for excluding certain crimes, it is not surprising that there is a longstanding criticism that too many non-emergency non-terrorism related crimes are tried by judge only. A 1983 evaluation of a sample of Diplock trials, concluded that 40 percent of the cases examined had no connection to either the

[564] Northern Ireland (Emergency Provisions) Act, 1973.
[565] Northern Ireland (Emergency Provisions) Act, 1991; Northern Ireland (Emergency Provisions) Act 1973. The offenses include murder, manslaughter, kidnapping, false imprisonment, assault, wounding with intent, arson to name a few.
[566] John Jackson and Sean Doran., *Diplock and the Presumption Against Jury Trial: A Critique.* [1992] Crim. L. R. 755. In this article the authors assert that the presumption is inefficient and an unjust way to determine mode of trial.
[567] *Id*, 758.

emergency or terrorism.[568] Doran and Jackson note that between 1987 and 1993 the Attorney General has certified out between 52 percent and 67 percent of the cases each year thereby permitting those cases to be tried by a jury.[569]

Doran and Jackson further contend that Diplock trials, like other judge only trials, have adversarial deficits which include the judge imposing during the trial by judicial questioning his/her theory of the case (defined in America as the story line of the case, that is how the facts meld into a story that demonstrates legal guilt or innocence); the judge limiting the trial scope by virtue of such a theory; the loss of jury nullification, and simple prejudice associated with invasive judicial questioning by the sole trier of fact.[570] Boyle refers to judicial questioning and the absence of a jury as creating a "closed shop in the hands of professional lawyers" observing that fairness is potentially compromised in judge only trials.[571] This is to be contrasted to some extent with Damaška's view that judicial decision making, while likely to be case hardened, is also more likely to focus on the relevant and ignore the prejudicial.[572] Case hardening was not a prevalent problem in Diplock judges, according to Doran and Jackson who in evaluating outcomes found that

---

[568] D.P.J. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland,* 16, 59-60, 80-82, (London: Cobden Trust, 1983). *See also,* H.C. Debs, standing Comm. D., co/411 [3 March 1987]; *See also,* Gerard Hogan and Clive Walker, Political Violence and the Law in Ireland, pg. 107 (Manchester University Press , 1989).

[569] John Jackson & Sean Doran, *Judge Without Jury, supra* note 533, *at* 22, The percentage of offenses certified out 1987 58%, 1988 54%, 1989 52%, 1990 52%, 1991 59%, 1992 56%, 1993 67%.

[570] *Id.*, 292-297.

[571] Kevin Boyle, *Human Rights and the Northern Ireland Emergency in Human Rights in Criminal Procedure*, 140, 160 (John A. Andrews, Ed. Kluwer Academic Publishers, 1982).

[572] Damaška, Mirjan, *Atomistic and Holistic Evaluation of Evidence,* 198-99 (New Haven, Yale University Press, 1990).

there was "a greater tendency for defendants to be acquitted in Diplock cases."[573] Indeed a review of the legal literature does not demonstrate by virtue of statistical outcomes or even an overwhelming body of anecdotal evidence that Diplock verdicts manifest a pattern of palpable unfairness and injustice.[574]

B. England and Wales

The menu of options for mode of trial selection in serious fraud cases is complicated in England and Wales by recent political history and present legal precedent. For example, as noted above, indictable offenses are triable by jury only, while minor crimes (summary offenses) are triable in Magistrates' Court before lay judges.[575] A third category, either way offenses, which provide a choice to both the prosecution and the defendant, may (but not always) be more serious than summary crimes. In either way offenses, the accused may choose to have the case tried by a jury in Crown Court. The magistrate may also direct a Crown Court trial of either way offenses.[576] A comprehensive study found that the Defendant opted for Crown court in 30 percent of that Court's trials and the magistrate had made a direction in 52 percent of the cases.

---

[573] Doran & Jackson, Judge without Jury, *supra* note 533, at 224-225. Even though this was a small sample of 43 cases, the result is surprising.

[574] A somewhat critical review of "Judge Without Jury" in 1997 criticizes the clinical nature of the work and its preoccupation with accent on details such as that trial judges questioned 56% of the prosecution witnesses but 84% of the defense witnesses – however there is no substantive refutation of the author's generally positive conclusions about the Diplock trials fairness. See Virginia E. Hench, *I'll be the Judge – I'll be the Jury,* H-Net Reviews, May 1997, http//www.h-net.org/reviews/showrev.cgi?path=27414868966685.

[575] Part II of the Criminal Law Act 1977; §49 Criminal Procedure and Investigations Act 1996.

[576] Paragraphs 36 of Schedule 3 to the CJA of 2003 which would amend 519 and 20 of the Magistrates Courts Act 1980. Paragraph 3 of Schedule 3 would permit the Defendant to inquire from the Magistrate if their sentence would be custodial if they pled.

In the early 1990s either way offenses were 82 percent of the cases tried in Crown Court.[577]

However, Parliament on several occasions, as well as the Runciman Royal Commission and the Auld Report, have recommended doing away with or limiting either way cases, thereby taking away the defendant's right to choose the mode of trial.[578] By contrast as previously noted, under existing law, if the case is indictable the defendant may only be tried by jury and may not opt for a judge only trial.[579]

It is likely an advantage for the defendant to have the right to a choice of mode of trial because it allows the defendant to evaluate chance of acquittal by a jury rather than by magistrate.[580] Criminal Justice Act 2003 recognizes that plea decisions are relevant to mode of trial choices.[581] Cost may also be a significant factor. While there is little research as to the impact of cost on defendant's decision making, American studies show

---

[577] Chairman: Viscount Runciman of Doxford, The Royal Commission on Criminal Justice Report, pg. 85, see also Footnote 2, [1993] HMSO (hereinafter Runciman Royal Commission).
[578] Review of the Criminal Courts of England and Wales by the Regent Honorable Lord Justice Auld [September 2002]A http:/www.criminal_courts_review.org.uk/ccr_od.htm, #25, #119-172, Recs 32-36, Summary #10, "The Defendant should not have an elective right to trial by judge and jury in "either way" offenses"; Runciman Royal Commission, *supra.*, pg. 87, "We do not believe that this decision should be left to the defendant although he should have a voice in the matter."
[579] Criminal Law Act 1977 (as amended) divides criminal jurisdiction into three classes: a) offenses triable only on indictment before a judge and jury, b) offenses triable only summarily by magistrates, c) offenses triable either way. However, the Auld Report recommends that the defendant, with the judge's permission be given the right to opt for a judge only trial in Crown Court. *See,* Auld Report, *supra* note 16, at para. 110-118, Recommendation 31.
[580] C. Hedderman and D. Moxon [1992] *Magistrates or Crown Court? Mode of Trial Decisions and Sentencing*, London, HMSO. D. Rielly and J. Vennard [1988] *Triable-Either-Way Cases: Crown Court or Magistrates Court*, London, HMSO; D. Moxon (ed) Managing Criminal Justice, the Outcome of Contested Trials, (1985). The foregoing reports indicate an improved chance of acquittal (57%) in Crown Court as compared to Magistrate's Court (30%).
[581] CJA 2003, Schedule 3 discussed previously.

that jury trials are lengthier and more costly than bench trials.[582] The survey conducted for this paper did not find that cost of trial was the most significant factor in the opinion of New York State judges and lawyers in the making of mode of trial decisions.[583] A recent practice direction in England and Wales regarding complex criminal case management emphasizes that trial length should be shortened in part "to make proper use of limited public resources".[584]

However, a substantial number of "either way" defendants choosing a jury trial still choose to plead guilty by the day of trial.[585] In summary, Magistrates Courts deal with 95 percent of the criminal cases, juries determine the outcome of less than 1 percent of all cases, and 60 percent of Crown Court defendants plead guilty before trial.[586]

As noted in the previous chapter, the present England and Wales policy that emphasizes improvement of jury trial management in serious cases was preceded by two recent decisions of the Court of Appeal which have exhorted trial judges to take control of lengthy jury trials, impose time limitations, start each day of trial on time, emphasizing that time in such a trial is not unlimited, stating:

---

[582] Richard A. Posner, The Federal Courts: Challenge and Reform, 193-94 N. (2d Ed. 1996); The National Center for State Courts, *On Trial: The Length of Civil and Criminal Trial,* 8-9 (1988). Both works conclude that jury trials are two to three times longer than non-jury trials; *See* Posner, *supra* note 583, FN 15 citing the Rand Institute for Civil Justice, which states that the administrative costs for jury trials are ten times greater than non-jury most likely because of jury expenses, the cost of duplicative experts, and the extensive court personnel associated with a jury trial.

[583] Chapter 8, *infra.*

[584] Control and Management of Heavy Fraud and other Complex Criminal Cases – a Protocol Issued by The Lord Chief Justice of England and Wales [2005] All Eur (D) 386 (Mar).

[585] Viscount Runciman The Royal Commission on Criminal Justice (HMSO 1993)at 87.

[586] Gary Slapper and David Kelly, The English Legal System, 7th Ed., 524 (Cavendish, 2004).

> "Justice must be done . . . It is not however a concomitant of the entitlement to a fair trial that either or both sides are further entitled to take as much time as they would like . .."[587]

These administrative options are attempts to streamline the complex jury trial given a failure to persuade parliament that trial by judge is a an acceptable choice of mode of trial. The choice of mode of trial debate has recently been dominated by the government's failed attempt to call forward Section 43 of the CJA 2003 which would have permitted only complex fraud cases to be tried before a judge only if an application for such a trial was made by the prosecutor and granted by the Lord Chief Justice or his designee.[588] As noted earlier in this thesis, under strong opposition from both the Law Society,[589] and the Bar Council, the government retreated from its efforts to call forward Section 43 of the CJA 2003 (the Law Society advocating giving the managerial guidelines proposed by the Chief Judge time for implementation and analysis) and has now proposed virtually the same legislation, differing only in that the present bill would allow a High Court Judge to determine if the trial will be by judge or jury. As further

[587] R. v. Jisl, et al [2004] EWCA (Crim.) 696 #114; R. v. Chaaban [2003] EWCA (Crim.) 1012.
[588] In November, 2002 when CJA 2003 passed the House of Commons, then Home Secretary David Blunkett gave David Hughes, the Liberal Democrat spokesman, the undertaking that "we will retain the clause but move forward on looking for alternative solutions" to Judge only fraud trials. The House of Lords held up 43 CJA 2003 arguing a lack of proper consultation. www.publications.parliament.uk Lord Kingsland, 21 June, 2005.
[589] The Law Society, Preserve the Right to Jury Trial – Law Society Briefing – Law Reform and Legal Policy (6July 2005); Don't Abolish Juries in Frauds Trials (25 Nov. 2003); Government Climbs Down Over Abolishing Juries in Fraud Trials (3/14/06), www.lawsociety.org.uk.

noted above, while the bill passed commons it was unable to muster the votes to proceed to a second reading in the House of Lords.[590]

The history the Criminal Justice Act 2003 which was discussed initially in chapter 4 requires further amplification. Early in the process of promoting what ultimately became 43 CJA 2003, the concept of permitting the defendant to choose the mode of trial was initially included in the legislation. In an effort to pass the Criminal Justice Act 2003, the government dropped the clause permitting the defendant the choice of mode of trial on indictment in the Criminal Justice Bill 2002-2003 based on strong opposition to that language.[591] Despite this significant compromise as noted, the government in 2003 was forced to further amend the bill to provide that the Serious Frauds trial by judge provision would require further parliamentary action which has not yet been successfully obtained.[592]

In late 2006, the Frauds Trials Without Jury Bill was proposed to implement virtually the same scheme which was resisted in CJA 2003 permitting bench trials in certain serious frauds cases but this version would authorize a High Court Judge to decide mode of

---

[590] James Lumley, *U.K. Plans to Try Complex Fraud Cases Without Juries* (update 2), Bloomberg.com htpp//www.bloomberg.com (June 21, 2005).; Bill 6 of 2006-07, *supra*

[591] H.L. Debates, 5 July 2003; C768-82, *Blunkett Furious as Lords Throw Out Reform of the Jury Trial*, The Guardian, 20 Nov. 2003.

[592] BBC News, *£60m Fraud Case Collapse Probed,* March 23, 2005, http//news.bbc.co.uk. "Anthony Upward, QC for the prosecution requested the trial be discontinued because the evidence was no longer a "living story and had lost its immediacy and impact"; City & Financial; 3/23/06, The Conduct of Fraud Trials: New Proposals, www.cityandfinancial.com; The proper caption of this case is Regina v. Stephen Rayment, Mark Woodward-Smith, Paul Maw, Paul Fisher, Mark Skucner, Grahm Scard, and Anthony Wootton.

trial.[593] Once again the defendant was not accorded the privilege of mode of trial selection in the legislation. The ability of the defendant to have mode of trial choices has been lost in the debate over jury competence and heightened judicial managerialism.[594]

The counter argument raised by the Law Society advocates managerialism rather than judicially imposed bench trials:

> "Juries are not to blame for lengthy trials. The solution lies in better case management. The new criminal procedure rules and complex case protocol introduced by Lord Woolf in March must be given an opportunity to work before any decision is made to abolish juries."[595]

The Law society has not recently advocated for the defendant to have a choice of mode of trial. Chapter 9 will discuss the issue of mode of trial choices and the effectiveness of the present protocols from the perspective of England and Wales judges.

C. U.S.A.

The choice of mode of trial is an important pretrial strategic decision in an American criminal case. As noted above, bench trials are selected in some American jurisdictions

---

[593] Bill 6 of 2006-07 (The Frauds Trials Without a Jury) Bill 2006-07, which presently has passed the House of Commons but failed its second reading in the House of Lords on March 20, 2007.
[594] *Id.*
[595] The Law Society of England and Wales, Don't Abolish Juries in Fraud Trials, 11/25/05 www.lawsociety.org.uk. The Law Society reference is to Lord Woolf, the then Chief Justice of England and Wales, who promulgated detailed control and management guidelines for all courts hearing fraud and complex fraud cases. Control and Management of Heavy Fraud and Other complex Criminal Cases – A Protocol Issued by the Lord Chief Justice of England and Wales [2005] All ER (D) 386 (MAR).

because they are utilized as a plea bargaining device; specifically one analysis concluded that because of slow plea type trials in Philadelphia in the 1980s, "Defendants opting for bench trial accept a higher likelihood of conviction in anticipation of a more lenient sentence."[596]

Kalven and Zeisel concluded that concern about sentencing is a factor in the U.S.A. in the choice of mode of trial (similar to either way offense decision making in England and Wales as noted above), concluding that many defendants opt for a bench trial in order to preserve their right to trial, believing that the sentencing will be more lenient if convicted in a non-jury forum.[597] Leipold's recent study entitled "Why are Federal Judges So Acquittal Prone?" ponders the apparent failure of the criminal bar to perceive this statistical reality and more frequently seek trial by judge only in U.S. Federal District Courts. The very theme of the article accentuates the significance of choice of mode of trial in pretrial decision making in the U.S. As we will see in Chapter 6 that choice can impact the circumstance where corporations and other legal fictions are tried as criminal defendants.[598]

---

[596] Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harvard L. Rev., 1037, 1087 (1984). There is a 20% acquittal rate for bench trials and 25% rate of conviction on lesser charges only. *See* TableV, *supra* at page 1080.

[597] Id., at 1066.

[598] Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?* 83 Wash U.L.Q. 151 (2005). One caveat to his argument regarding the perceived failure of the defenses bar is whether or not the Court may order a bench trial over the prosecutions objection. In FN 28, Leipold asserts that Singer v. U.S., 380 U.S. 24 (1965) at 37-38, upholding Rule 23's requirement of prosecutorial waiver, left open judicial override where the defendants right to a fair trial might be adversely impacted by a jury trial.

1. California

In California there is a right to a jury trial but a jury may be waived in a criminal case by the consent of both parties when expressed in open court by the defendant and the defendant's counsel.[599] The standard used to determine if the defendant has capacity to waive a jury trial in a criminal case is the same as the standard to determine competence to stand trial.[600] Parties may waive a jury trial in civil cases, but the court is empowered to order a jury in any event.[601] In fact, a recent case decided in the California Supreme Court, holds that both the State Constitution and California Code of Civil Procedure §631(d) prohibit contracting parties from waiving a civil jury trial, requiring that such a waiver must be orally uttered in open court or waived by failing to timely a jury during the timetable established during the litigation or failing to pay the jury fee.[602]

2. New York State

In New York State the defendant has the right to trial by jury and may exclusively elect trial by judge. The defendant's right to choose the mode of trial was not recognized by state courts until 1957.[603] The present statutory law accords the defendant near absolute control over the choice of mode of trial in that the defendant may choose the mode of

---

[599] Art. I, §16, Cal. State Const., Trial By Jury, "A jury may be waived in a criminal case by the consent of both parties expressed in open court by the defendant and defendant's counsel."
[600] Godinez v. Moran, 509 U.S. 389, 396-97 (1993). James Fife, *Restarting Criminal Proceedings After Restoration of Defendant's Competence*, 27 T. Jefferson L. Rev. 93 (2004).
[601] Cal. State Const. Article I §16 Trial by Jury; Cal. Code of Civil Procedure, Trial by Court §631 (Deerings, 2005) permits the Court in civil cases to order a jury trial even though has been a failure to request the same.
[602] Grafton Partners L.P. v. Superior Court, 36 Cal. 4th 944 (2005); Daniel M. Livingston, *Pre Dispute Jury Waivers After Grafton Partners: Pretrial Waiver of the Jury Just Became More Difficult in California*, 47 Orange County Lawyer 38 (2005)
[603] *See* Harry Kalven & Hans Zeisel, *The American Jury* (Boston: Little Brown 1966) at 22-23.

trial for all crimes except murder in the first degree, which must be tried by a jury.[604] The judge is obligated to order a bench trial unless it is determined that the request is tendered as a strategy to procure an otherwise impermissible procedural advantage or if the defendant is found to be not fully aware of the consequence of the choice he is making.[605]

The evidentiary rules and procedures in a trial by judge are the same as in a jury trial – in a judge only trial the court is bound to consider only competent evidence in reaching a verdict,[606] but the survey conducted for this paper found that the attorneys questioned did not view that the defacto rules of evidence in a bench trial were the same as in a jury trial.[607]

3. U.S. Constitution

The defendant has the constitutional right to a jury trial if the punishment for the crime is more than a six-month sentence.[608]

---

[604] N.Y. Criminal Procedure Law §260.10; 320:10 (McKinney, 2006).
[605] N.Y. Criminal Procedure Law 320.20 (McKinney, 2005). The main impermissible strategic advantage associated with demanding a bench trial appears to be utilizing that request to obtain a severance from a joint trial with other co-defendants. Courts have denied demands for a bench trial in such a circumstance. People v. Firestone, 111 A.D.2d 696, *lv. denied* 65 N.Y.2d 927 (1985).
[606] People v. Torres, 249 A.D.2d 229, 673 N.Y.S.2d 72 (1st Dept., 1998); People v. Dazi, 195 A.D.2d 571, 600 N.Y.S.2d 276 (2nd Dept., 1993).
[607] Chapter 8, *infra.*
[608] Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) which stands for the holding that the right to trial by jury attaches for crimes carrying over six months incarceration became that it is arbitrarily determined to be a significant liberty interest; Duncan v. Louisiana, 391 U.S. 145 (1968) applies via the Fourteenth Amendment to the U.S. Constitution, the Sixth Amendment to the States.

4. Federal Rule

In Patton v. U.S., the United States Supreme Court held that the defendant had the right to waive a jury trial and be tried by a judge, but a subsequent decision does not find that right to be absolute.[609] Under the Federal Rules of Criminal Procedure only an agreement of the parties waive a jury trial and it is settled law that the prosecutor may veto a waiver of the jury by the defendant.[610]

An example of jury waiver is the 2006 business fraud case against former Enron Executives (discussed at great length in Chapter 4), the late Kenneth Lay[611] and Jeffrey Skilling, who were charged with a series of crimes alleging a defrauding of stockholders. By stipulation the prosecutors and the defendant Lay agreed to sever personal, non-business related bank fraud charges against Lay from the jury trial and permit those charges to be tried by a bench trial which was conducted while the jury deliberated on the business fraud trial.[612] Lay was found guilty by the jury and immediately that verdict was rendered by the jury, was found guilty by the Judge in the same court session regarding the personal allegations of bank fraud.[613]

---

[609] Patton v. U.S., 281 U.S. 276 (1930).
[610] Fed. R. Crim. P. 23(a) , see Singer v. U.S., 380 U.S. 24 (1965) upholding the ability of the prosecutor to reject a waiver by a defendant of a trial by jury and require a jury trial.
[611] Lay died suddenly several months after the verdict and prior to his sentencing.
[612] Vikas Bajaj, *A 2nd Criminal Trial Begins for Former Enron Chief*, The New York Times, May 19, 2006 at C4. In fact, the bench trial commenced immediately after the jury trial, while the jury was deliberating, with the same judge who tried the fraud case. Lay was found guilty by the judge immediately after the jury verdict – the bench trial having been completed in several days.
[613] Alexi Barrionuevo, *2 Enron Chiefs are Convicted In Fraud and Conspiracy Trial*, New York Times, May 26, 2006, 1 C4.

The United States Supreme Court has upheld a two tier system, wherein in municipal court defendants can opt for a bench trial, appeal the verdict if convicted, and as of right, and receive a jury trial. The constitutional concept of double jeopardy according to the U.S. Supreme Court does not attach to this unique system of bench trials in which the verdict can be appealed to a jury by the Defendant.[614] An acquittal at bench trial precludes the prosecution from seeking a jury trial. In only 9% of the cases in Massachusetts did the Defendant seek another trial after a bench trial, thus:

> "The system allows the State to dispose of the thousands of criminal proceedings quickly and inexpensively because most defendants, are either acquitted by the first-tier bench trial judge or do not appeal because first-tier judges usually impose mild sentences."[615]

A comparable system is in place in at least seventeen of the states of the United States (but not New York or California).[616] Obviously the decision to have a bench trial is again a less nuanced decision than if the trial is the ultimate fact finding event.

D. Canada

Any crime committed in Canada carrying a five year jail sentence or more must be tried to a jury,[617] however the defendant may opt to have the trial before a judge only.[618] The

---

[614] Lydon v. Justice of Boston Municipal Court, 536 F. Supp. 647, 649 (D. Mass) aff'd 698 F.2d 1 (1st Cir. 1982) *rev'd on other grounds*, 104 S.Ct. 1805 (1984).
[615] Adam N. Volkert, *Fifth Amendment – Double Jeopardy: Two Tier Trial Systems and the Continuing Jeopardy Principle*, 75 J. Crim. L. & Criminology 653, 670 (1984).
[616] *Id* at 670.
[617] Section 11, Canadian Charter of Rights and Freedom.
[618] Sections 536 and 561 of the Criminal Code.

Attorney General may require the accused to be tried by judge and jury, in that event, a judge has no jurisdiction to try the accused without a jury.[619]

VI. Judicial Disqualification and Peremptory Challenge

As we see in chapter eight of this paper, integral to the choice of mode of trial is the identity of the judge. If the judge is perceived as biased or case hardened, and will be the trier of fact, the notion of systemic fairness will be undercut if trial by judge is imposed upon the defendant as in 43 CJA 2003 or Bill 6 of 2006-07. If the defendant has a choice of mode of trial, the perception of unfairness or concern about case hardening will diminish making the judge only trial a more viable option. The survey conducted for this paper, as more fully discussed in chapter eight, found that the identify and personality of the judge was an important factor in making mode of trial choices in New York State.

This section will review methods of judicial disqualification and the California system of peremptory challenge of judges and offer suggestions to encourage positioning judge only trials as a viable mode of trial option.

A. The California System of Peremptory Challenges of Judges

The motion to disqualify the judge is to be made within thirty days of the first appearance in the case or within twenty days of a party being added to the case.[620]

---

[619] Section 568 of the Criminal Code.

[620] Cal. Civil Practice Code (C.C.P.), P 170.6(3); In Industrial Indemnity Co., et al v. Superior Court of Santa Clara County, et al., 214 Cal.App.3d 259 (1989) 264, the Court upheld the twenty day rule for add-on parties reasoning that since the case is underway, abuse of the statute is likely

Once a judge has decided a contested issue in the case, a motion for a peremptory challenge is untimely.[621]

In all of the comparator jurisdictions, trial judges are randomly selected. The choice of the trial judge is significant in both jury and non-jury trials, but looms much larger in non-jury cases. Unlike the jury selected either randomly or as a result of vior dire and peremptory challenges, the trial Judge will be the sole trier of fact, not subject to the type of interaction and exchange ideas that naturally occur during jury deliberations. It may be that leaving the verdict to one person, the trial judge, who is randomly selected, offers American defense counsel a pause in the decision to waive the jury.

In all jurisdictions counsel may move to challenge the judge for cause, i.e. prejudice and/or interest in the case pending. But that is quite different, indeed remote from having the right to peremptorily challenge the judge.

California offers a form of peremptory challenge. The American Federal Courts "use a single assignment system, under which a case is assigned to a specific judge for virtually all purposes to and including trial. California State Courts have traditionally used a

---

because the Judge will have issued rulings and the add-on party will be able to challenge for reasons other than bias.

[621] Barrett v. Superior Court , 77 Cal. App. 4th 1 (1999).

master calendar system under which different phases of a case ordinarily take place before different judges".[622]

> "A party who seeks to disqualify a Federal judge assigned to a case must establish the existence of a statutory ground for disqualification – ordinarily the existence of a bias or prejudice on the part of the judge."[623]

In California attorneys in either a civil or criminal case are entitled to one peremptory challenge of the trial per side, whether civil or criminal.[624] The statute, §170.6 of the California Code of Procedure, hereinafter C.C.P., makes no mention of peremptory challenge and rather it provides that each attorney or party may make a motion alleging prejudice which is then automatically granted one time without any showing other than the allegation.[625]

The California process permits a party to file a general affidavit alleging without any specifics that in the party's opinion the assigned judge has prejudice toward them, without being required to establish prejudice as a matter of fact to the satisfaction of the court.[626] The right to move to peremptorily challenge the trial judge is generally on a per side basis, with leave given by the court upon application to allow more that one

---

[622] Justice Eileen C. Moore and Michael Paul Thomas, Cal. Civ. Prac. Procedure, Chap. 5 §5.7 ((Thompson West Books, 2006).
[623] *Id.*, Chap. 5, §5.7; 28 U.S.C.A. §144, 455.
[624] Moore and Thomas, *supra* note 623; Cal. Civil Practice Code §170.6; Home Insurance Co. v. Superior Court, 22 Cal. Rptr, 3d 885, 34 Cal. 4th 1025, 103 P.3d 283 (2005).
[625] C.C.P. §170.6(3)
[626] C.C.P. §170.6 (5) actually sets forth the format:
"That (the name of judge) the judge before the trial of the (case name) is pending is prejudiced against the party or the interest of the party (or his attorney) so that affiant cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge."

defendant to separately challenge if that defendant demonstrates interests that are substantially adverse to the other party.[627]

B. England and Wales

The law of judicial disqualification and recusal was clarified if not expanded in a decision by the Law Lords that a fellow law Lord improperly sat in a case in which a charitable organization for which he was the chief fund raiser became a party to the action.[628]

The decision is noteworthy not just because of the holding, but also because the court found that the judge in question, Lord Hoffmann, was in violation of the first branch of apparent bias in that he was a judge in his own cause and not the second branch, which is engaging in behaviour or conduct which may give rise to a suspicion that he is not impartial. The issue was whether Pinochet Ugarte had immunity from acts while head of state after relinquishing head of state status, thereby protecting him from extradition to Spain. Amnesty International was granted leave to intervene in the proceedings advocating Pinochet Ugarte's extradition. Lord Hoffman sat on the case and voted against the position of Pinochet Ugarte, who was ordered extradited by the Law Lords. A subsequent proceeding was brought before the House of Lords asserting that Lord

[627] Home Insurance Company v. The Superior Court of Los Angeles County, *supra*; School Dist of Okaloosa County v. Superior Court, 58 Cal. App. 4th 1126.
[628] R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No2) [2000] 1 AC. 119, [1999] 1 All. ER 577, [1999] 2 WLR 272.

Hoffman as fundraising chair for the incorporated charity which funded Amnesty International was sitting in judgment of his cause, a prohibited act.[629]

Lord Browne-Wilkinson in rendering the main judgment reasoned with Lord Goff of Chieveley that the prior order extraditing Pinochet Ugarte should be set aside and referred to a new committee because of the relationship between Lord Hoffman and Amnesty International, not withstanding any actual opinions he may have about Pinochet Ugarte's case. The reasoning was that by virtue of his relationship with Amnesty International's fund raising entity, he was sitting in judgment of his cause.

The general assumption is that a biased judge creates a denial of natural justice. Bias is defined as:

> "Pecuniary bias but other forms of bias are relevant as where, for example, the chairman of the magistrate's states that he always prefers the evidence for the prosecution given by the police. It was held in Seer Technologist Ltd v. Abbas, the Times, 16 March, 2000, that it was inconceivable that any legitimate objection could be taken against the judge purely on grounds of religion, gender, age or sexual orientation."[630]

According to John P. Frank "English common law practice at the time of the establishment of the American Court system was simple in the extreme, judges were disqualified only for financial interest. No other disqualifications were permitted, and

---

[629] Dimes v. Proprietors of Grand Junction Canal (1852) 3 HL Cas 759, 10 ER 301; R. v. Rand (1866) LR 1 QB 230 and R. v. Gough [1993] 2 All ER 724, [1993] 2 AC 646.
[630] Denis Keenan, Smith & Keenans English Law, (14th Ed. Pearson Education Ltd. 2004), page 73.

bias, today the most controversial ground for disqualification, was rejected entirely".[631] Medieval recusal practice was more complex, permitting a judge to be declined for cause such as his relationship to a party, if he is hostile to a party, if the judge has been a counsel in the case.[632] Bentham is reported to have proposed the disqualification of judges "exposed to any cause of partiality, including intimate acquaintance, enmity and family relationship".[633]

Leubsdorf notes that permitting the parties to select the impartial trier of the dispute has a long history dating back to ancient Rome and including 17th Century England.[634] The point is both ancient law including that of England and Wales and present law in the form either way defendants being able to select either Magistrate's Court or Crown Court, accord the litigants, and particularly the defendant, with some control regarding the mode of trial.

---

[631] John P. Frank, *Disqualification of Judges*, 56 Yale Law Journal 605, 611-612 (1947). See also E. Richard Bodyfelt, Editor in Chief et al *Disqualification of Judges for Prejudice or Bias-Common Law Evolution Current Status and the Oregon Experience*, 48 Oregon L. Rev. 311, 315-320 (1969).

[632] John P. Frank, *Disqualification of Judges*, *supra* note 631, 610 FN 13, 1516.

[633] John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 248, FN 64 (1987).

[634] John Leubsdorf, *supra* note 633, at 249-250 FN 70 citing B. Frier, *The Rise of the Roman Jurists* (1985) "describing choice by Roman litigants of judges from official panel); C.C.F. Mann: The Formulization of Informal Law: Arbitration Before the American Revolution, 59 N.Y.U. L. Rev. 443, 446, FN 73 (1984) discussing voluntary nature of arbitration in Seventeenth Century England and reliance on continuing commitment of the parties; "Indeed, Elizabethan Chancellors frequently persuaded litigants to submit to arbitration by local notables. " *See also,* John Philip Dawson, A History of Lay Judges, 163-70 (1960).

C. U.S.A.

American Judges have both statutory standards and judicial codes of ethics to govern their conduct on issues of disqualification and recusal.[635]

Moreover, along with California, at least 17 states have statutory provisions which permit judicial disqualification by a method comparable to the California conclusory Affidavit.[636]

United States District Courts require a specific finding that he/she must disqualify or recuse. For example pursuant to 28 U.S.C. 144 when a party makes an allegation in affidavit form alleging judicial bias and requesting judicial disqualification, another Judge is assigned to make such a determination based on a detailed affidavit required by the statute. U.S.C. §455(a) requires the judge to remove himself/herself "in any proceeding in which his impartiality might reasonably be questioned".[637] Of course, the Model Code of Professional Responsibility for lawyers, DR 8-102, provides that "a lawyer shall not knowingly make false accusations against a judge ..."

Lawyers are reluctant to utilize this method of disqualification out of fear of retaliation, a concern particularly relevant in a judge-only trial because "in a bench trial, a judge's bias

[635] 28 U.S.C. 144, 28 U.S.C. 455(a) and Rule 2.12 of the Model Code of Judicial Conduct. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned", then reciting bias, prejudice and relationship issues.
[636] John Leubsdorf, *supra* note 633, FN 13, from the author's independent review this note remains correct in 2006.
[637] 28 U.S.C. §455(a).

or prejudice against the lawyer is even more destructive of fairness than it is in a jury trial because a jury trial may counter balance judicial prejudice."[638]

The United States Congress seriously considered permitting peremptory challenges of judges in Federal cases in the past, most recently in 1970 and 1980, . A note analyzing the 1980 effort concluded that the Federal system would not benefit from a California type recusal system.[639]

For example in the California system, peremptory challenge can be made by either the client or attorney,[640] unlike the Federal System which requires an affidavit of personal prejudice filed by a party.[641]

One commentator asserts that the California system encourages judge shopping, causes judicial waste, creates a personal affront to the judges and erodes the appearance of justice.[642] A 1969 study of the effect of a similar law in Oregon concluded the opposite, "there are very few indications that the statutory procedures are being used to select, instead of disqualify judges."[643]

---

[638] David C. Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. Kan. L. Rev. 255, 255-256 (1981-1982).
[639] Edward G. Burg, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 Cal. L. Rev. 1945 (1981) see FN 1 which recites the recent congressional history of peremptory challenges of judges.
[640] Cal. Civ. Proc. Code 170.6 to be contrasted with an application for disqualification due to actual prejudice, which must be signed by the client. Cal. Civ. Prac. Code 170.5.
[641] 28 U.S.C. 144.
[642] Edward Burg, *supra* note 639, at 1471-1477.
[643] E. Richard Bodyfelt, et al; *supra* note 631, 399-400; the study also concluded that a judge is disqualified for statutory prejudice (a good faith belief that the judge is prejudiced – no further allegations or proof required) once in 200 cases.

The most compelling of these complaints is the issue of judge shopping. An example of a California case is useful. A California judge dismissed charges against prostitutes as discriminatory as the "Johns" or customers were not arrested. The next day the same judge was peremptorily disqualified by the prosecutor in prostitution cases. The judge declined the disqualification alleging the "motion was based sub-silentio only on her prior dismissals, but the refusal was ultimately reversed".[644] It is quite clear that given the judge's ruling the day before, the prosecution sought disqualification of that judge in a comparable case. The appellate court held that the prosecution was well within its right.

VII. Conclusion

The mode of trial choices and judicial challenge methodologies as examined among the comparator jurisdictions offer contrasting approaches. Because New York in the area of the mode of trial choice and California by virtue of its system of challenging judges identify a unique format to the rest of the comparators, the next logical step is to evaluate the application of those formats to daily administration of justice, with the objective of formulating possible alternatives.

[644] Edward Burg, *supra* note 639, at 1471 citing Solberg v. Superior, 19 Cal 3d 182, 561 P.2d 1148 (1977).

CHAPTER 6

CALIFORNIA AND NEW YORK – CHOICE OF MODE OF TRIAL AND CHALLENGES OF JUDGES CONSIDERED – IS THERE A CASE FOR GIVING THE DEFENDANT THE CHOICE OF MODE OF TRIAL AND THE PARTIES A CHALLENGE OF THE JUDGE?

I. Introduction

New York State and California each have in place components of a system which, if combined, could improve the perception of fairness of the bench trial and offer resolution to the mode of trial debate in England and Wales and the U.S.A.

Shifting control over the choice of mode of trial to the defendant in the comparator jurisdictions would be one of several integral steps aimed at offering the bench trial as a rational option to the jury trial, thereby avoiding concerns about the ability of a jury to comprehend the evidence in serious fraud trials. Specifically permitting both sides of the case to either stipulate to a specific judge for a bench trial or if they cannot so stipulate, then offering a peremptory challenge of the randomly selected judge to preside over the bench trial would give the defendant incentive to consider trial by judge. Each proposal would modify the present balance of decision making and give the defendant more rights than accorded by 43 CJA 2003 or Bill 6 of 2006-07, which both give the prosecution only the right to apply for trial by judge and a High Court Judge the sole decision making discretion regarding mode of trial. It would likewise alter the U.S. Federal District Court mode of trial selection which requires agreement between the parties for a bench trial and

would introduce into all comparators, England and Wales, U.S. District Court, New York, and Canada, the California method of peremptory challenge of the judge. Coupled with the establishment of uniform rules of procedure and evidence as discussed in the upcoming chapters which would be applicable to both bench and jury trials, the judge only trial would be a more comfortable forum for the parties to select in complex civil and criminal cases.

Even though New York State permits the defendant, without any significant restriction, to select the mode of trial, the choice of a bench trial as the mode of trial in New York State is no more frequent than the more restrictive California, according to the data presented below. This is true even of corporate defendants who are accused of crimes in New York State court. As will be more fully elucidated in Chapter 8, a survey conducted of the bench and bar in New York State suggests that there is reluctance to select a judge only trial because of concerns about the judge's identity and personality, i.e. who the judge will be. Consequently the California system of peremptory challenges to the judge may make that mode of trial more attractive, particularly if the parties are offered the opportunity to stipulate to a specific judge trying the case.

Such a plan could potentially offer succor to the organized bar and the majority of the House of Lords who have great resistance to the government plan in England and Wales.

If the bench trial becomes a more predictable option, with predictable evidentiary rules and restrained judicial behavior, corporations and complex fraud defendants may

diminish the negative pre-adjudication effects of indictment by virtue of a more compact and prompt adjudication. Properly constructed, bench trials could become a more frequent choice by the Defendant in complex cases.

II. The Recent New York State and California Experience with Bench Trials – A Brief Statistical Comparison of Rate of Selection of Bench Trials and Trial Outcomes

A. Choice of Mode of Trial

As noted in chapter 5, in New York State the defendant may choose the mode of trial and may exercise that option at any time prior to jury selection. By contrast, in California there must be a stipulation by both the prosecution and the defense to waive the jury and try the case by bench trial. Unlike California, the parties in New York may not exercise a peremptory challenge as to the trial judge; the judge assigned to the case is the judge who will try the case subject to any challenge for cause, i.e., interest or prejudice.[645] In California, the parties are entitled to a virtual peremptory challenge of the trial judge as discussed in detail in Chapter 5.

Because the California State constitution requires a joint waiver of a jury trial (that is both the prosecution and the defendant must consent to a bench trial) a comparative

[645] New York Rules of Courts –Uniform Rules – Trial Courts; P. 198, Subpart B, Assignment of Criminal Actions §200.11 a-c (McKinneys, 2006).

analysis of bench trial statistics with New York State, where the defendant is the exclusive selector of the mode of trial must consider that difference.[646]

B. Rate of Choice of Bench Trial

Bench trials in New York State are opted for by Defendants in the same percentage as bench trials in California.

In California, twenty-one percent of all felony cases tried were bench trials from 1999-2005. In New York, nineteen percent of all felony case tried were bench trials from 2001-2005.[647]

C. Conviction Rates

Conviction rates may be relevant factors in the choice of mode of trial. The California conviction rate in bench and jury trials is somewhat higher than in New York State. In California:

> 82% of bench trials on felony charges resulted in convictions
>
> 18% of bench trials resulted in acquittals, dismissals, and transfers
>
> 83% of felony jury trials result in felony convictions
>
> 17% of felony jury trials resulted in acquittals, dismissals and transfers.[648]

---

[646] Art. 1, Sec. 16, Cal. State Constitution,"A jury may be waived in a criminal case by the consent of both parties expressed in open court by the defendant and the defendant's counsel". N.Y. Criminal Procedure Law §320.10, 320.20 permits the defendant to opt for a bench trial (McKinneys 2006).

[647] Judicial Council of California, Administrative Office of the Courts Annual Reports 1990-1991-1999-2000 and 1995-1996 through 2004-2005; Statistics provided to the Author by the New York State Office of Court Administration, 2001-2005.

The following are the New York conviction rates in bench and jury trials:

70% of bench trials resulted in felony conviction

30% resulted in acquittal

71% of felony jury trials resulted in conviction

29% of felony jury trials resulted in acquittal.[649]

By comparison for reasons suggested earlier in Chapter 4, Andrew Leipold has found that the conviction rate at bench trial over a recent ten-year period by United States District Court judges is 54%, while the jury conviction rate is 85%.[650]

D. New York State Statistics Regarding Indicted Corporations

As discussed at length in chapter 4, a criminal indictment of a corporation is very likely to be a complex case, usually involving a form of fraud. As New York is a comparator in which the defendant can exclusively choose the mode of trial, a review was conducted of New York State's five year history of corporate indictments. All of the information and statistics utilized herein are derived directly from the New York State Office of Court Administration and are unpublished.

There were 214 cases brought from 2001-2005, of which 164 were resolved and 49 pending trial (the pending trial cases are shown as jury trials although the Defendant

---

[648] *Id.*

[649] Statistics provided for 2001-2005 from the New York State Office of Court Administration.

[650] Andrew D. Liepold, *Why are Federal Judges So Acquittal Prone?*, 83 Wash. U. L. Q. 151 (2005).

could waive a jury immediately before the commencement of jury selection). There were five jury trials and one non-jury trial, all resulting in convictions. There were, however, twenty-nine outright dismissals and twelve dismissals due to a superceding indictment.[651] Well over one-half of the cases brought against corporations demonstrated palpable complexity by virtue of the charges as there were eight money laundering cases, ten cases of a scheme to defraud, twenty-two enterprise corruption cases, twenty-nine conspiracy cases, sixteen cases alleging criminal violations of various sections of the Environmental Conservation Law (ECL) and thirty five grand larceny prosecutions. Other crimes suggesting complexity included offering a false instrument, insurance fraud, falsifying business records, and a scheme to defraud. The most serious fines/restitution levied were $690,000 for grand larceny, $1,2000,000 for grand larceny; $6,000,000 for enterprise corruption; $495,168 for grand larceny; $450,000 for violations of the Environmental Conservation Law.

The one bench trial verdict found the corporation guilty of grand larceny in the first degree, however the sentence was an unconditional discharge. The five jury verdicts included offering a false instrument, enterprise corruption, a violation of New York General Business Law (GBL) 650(2)(B)(1), a violation of the Environmental Conservation Law (ECL) (conviction on a lesser charge than the top indictment charge of reckless endangerment) and another finding of guilt under the ECL.

[651] The precise timing of these dismissals was not ascertainable from the records of the New York State Office of Court Administration.

III. Conclusion and Proposals for Reform

It is starkly apparent in New York State that the bench trial is not a commonly selected mode of criminal trial despite the defendant controlling the choice. While the sample examined was small, it is surprising that only 1 of 249 felony cases brought against corporations resulted in a bench trial. As has been previously noted, bench trials constitute 19% of all the cases tried in New York.[652]

In California statewide statistics for a comparable period 2001-2005 demonstrate a comparably lower percentage of bench trials than jury trials. In part this can be attributed to the

The selection of the mode of trial is entirely the choice of the defendant under New York law, but the only method for disqualifying the judge is a showing of prejudice,[653] and because the prosecution and the defendant must both consent to a bench trial in California, these statistics suggest several possible narrow conclusions:

> 1) Allowing the defendants the option of selecting the mode of trial in complex cases will not likely result in mass movement toward the bench trial. The New York State rate of bench trials in slightly lower than more restrictive California.

---

[652] Judicial Council of California Administrative Office of the Courts Court Statistics Report Statewide Caseload Trends 1990-1991-1999-2000; 1989-1990-1998-1999 and 1995-1996-2004-2005; a small fraction of the convictions for both modes of trial are for lesser misdemeanor charges. No separation is made because the New York State statistics do not make a distinction, they include both felony and misdemeanor convictions. Statistics provided directly to the author from 2001-2005 by the New York State Office of Court Administration.

[653] People v. Moreno, 70 N.Y.2d 403, 405 (1987); Hershowitz v. Tompkins, 184 A.D.2d 402, 404 (1st Dept., 1992).

2) Allowing the defendants to select the mode of trial does not deter pleas by corporate entities. Put another way, the available choice of a bench trial does not appear to provoke more trials.

3) The choice is principled and not solely to obtain advantage. The rate of conviction/acquittal should not be a major factor. A defense lawyer reviewing these numbers could not conclude that in these two comparator jurisdictions that the defendant has a significantly reduced chance of acquittal in front of a judge only and in Federal District Court, the defendant may have a better chance of acquittal.

Therefore it is suggested that the current reluctance in England and Wales to offer the defendant control over the choice of mode of trial is perhaps misplaced, assuming that the California and New York State statistics are facially applicable to England and Wales. Certainly the crimes alleged against the New York corporations discussed above have roughly equivalent offenses under English law. As noted in Chapter 2 and 3, there are differences in the comparator jurisdictions in jury selection and on the issue of jury anonymity. Chapter 4 does set forth some differences in corporate responsibility for director and employee actions. England and Wales has in fact embraced New York State's notion that broadest length and breadth of jurors should compose the venire and as a consequence, therefore previously permitted exemptions from jury service by occupation are not allowed. Thus one can postulate that if in England and Wales, as well as under American Federal law and New York State law, permitting the defendant to choose the mode of trial and allowing the parties to either stipulate to the judge and/or have peremptory challenges to the judge for judge only trials may make that mode of trial an attractive alternative to the jury in complex cases.

Chapter 7 will examine the rules of evidence in the comparator jurisdictions and how they are applied in both modes of trial. In Chapters 8 and 9 we will examine by survey and interview how the New York State and England and Wales court systems work, as well as testing some of the above proposals among judges and practitioners. Chapter 10 will offer more proposals for mode of trial choices, peremptory challenges and other issues raised in this work.

CHAPTER 7

COMPARATIVE EVIDENTIARY RULES JURY AND BENCH TRIALS

"Trial by judge alone would have much of the structure but, necessarily, many differences in procedure and evidence from that of trial by judge and jury. The role of the judge should not be considered as if it were something in isolation. Without a jury it becomes more than that of an umpire and distiller of law and facts for a separate fact finding body; he is also the fact-finder. He is inevitably more interventionist, testing and probing the issues of law and fat as they are canvassed before him. There is a greater dialectic between him and the advocates. And there is less of a role or need for procedural and evidential constraints designed to insulate lay fact finders from potentially unfairly prejudicial evidence."

The Auld Report

I. Introduction

The rules of evidence are a necessary element to the analysis of the complex trial function of jury and judge. What the key rules are and how they are applied in judge and jury trials is rendered salient by the well documented reality that the rules may differ between bench and jury trials.

The subsequent chapters report on a survey of a group of American judges and lawyers, as well as interviews with nine English trial judges. The application of evidence in jury and judge only trials permeates these surveys and interviews and raises significant questions in the U.S.A. and England and Wales about the consequences of mode of trial choices. The overarching question raised is that in opting for a mode of trial does that decision precurse evidentiary decisions which will impact upon the ultimate outcome?

To understand the ramifications of different evidentiary applications in bench as compared to jury trials, the key rules of evidence are compared between the jurisdictions, with some analysis of how they are applied in each mode of trial.

American evidentiary scholar James Bradley Thayer proclaimed that the law of evidence was "a child of the jury," noting that "the greatest and most remarkable offshoot of the jury was the body of excluding rules which chiefly constitute the English Law of Evidence.[654] For well over a century it has been the opinion of other evidentiary scholars that the rules of evidence are jury trial rules and therefore "absurdly inappropriate to any tribunal or proceeding where there is no jury."[655] Skepticism exists about the usefulness of many rules of evidence in America, Canada and England and Wales. Consequently it is not surprising that the law of evidence is applied to a different standard in bench trials as compared with jury trials.

An absence of a coherent evidentiary policy in the U.S.A. and in England and Wales regarding the application of evidence contributes to making the possible selection of the bench trial in each jurisdiction as a mode of trial an unwelcome leap of faith in complex cases where it is likely that close and difficult evidentiary questions abound. Indeed as

---

[654] James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 180-181, 508-509 (Boston: Little, Brown 1898); and Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph*, 88 Cal. L. Rev. 2437, 2449-50 (2000) and Paul Roberts & Adrean Zuckerman, Criminal Evidence 38-39 (2004).

[655] Kenneth Culp Davis, *An Approach to Rules of Evidence for Non-jury Cases*, 50 A.B.A.J. 723, 724 (1964), *quoting* McCormick, 5 Encyc. Soc. Sci. 637 (644) (1931). Prof. Davis summarizes the opinions of other scholars and groups in agreement such as Prof. Thayer, Sir Henry Maine, the American Bar Association's Committee on Improvements in the Law of Evidence, Prof. Moore, Prof. Wigmore, to name a few.

we will see in the next chapter, bench trials are rarely considered in New York State, a jurisdiction that permits the criminal defendant to choose the mode of trial.

If the bench trial is to be viewed as the jurisprudential equivalent to the jury trial in common law nations and therefore selected by defendants in complex cases, it is logical that the rules of evidence should also be the equivalent for each mode of trial or calibrated in a way that the trier of law is consistent in each case so that the parties and lawyers have a reasonable sense of what the rules will be for the bench trial. In short, lawyers should not be gambling as to what the rules of evidence will be in a bench trial as compared to a jury trial. A main purpose of this section is to evaluate the extent of that gamble.

For example, as we will explore further below, the present law of England and Wales is markedly distinct from America and Canada regarding the defendant's right to remain silent. In England and Wales inferences can be drawn from silence, the defendant's silence when confronted by the police is admissible in many circumstances. The failure to speak up in defense of the charges may be weighed by the jury in England and Wales, and specific jury charges are given by the judge based on such a failure. More specifically and by illustration, negative inferences are drawn from a failure to give the same explanation during interrogation as is given at trial or to give any explanation of ostensibly incriminating evidence during interrogation.[656] The defendant, if silent at trial, is otherwise protected by Criminal Evidence Act 1898 from adverse comment by the

[656] Criminal Justice and Public Order Act, 1994, c. 33, § 34-38, which supplements rather than supplants the Common Law, which also permits inference. R. v. Burdett (1820) 4 B&Ald.95, 120; R. v. Lepage [1995] 1 S.C.R. 654.

prosecution, but the judge or co-counsel for the accused may comment on the silence.[657] Comment by co-counsel is permitted in the U.S. and Canada as well.[658] This is a finely balanced arrangement which can be upset at a bench trial. What are the implications for the defendant at a hypothetical England and Wales bench trial who remains silent? Must the judge advise the defense counsel that he/she will draw an adverse inference from the Defendant's silence, thereby virtually compelling either testimony or a conviction? What are the implications for the defendant who asserts that silence during interrogation was on the advice of counsel? Isn't the bench trier of fact weighing that testimony with a different eye toward reasonableness? Does the defense solicitor responsible for that advice become a necessary witness?

In the U.S.A. and Canada the different presumptions regarding silence will likely make the intra-trial calculation less problematic in the instance of declined testimony than in England and Wales.

After careful study and extensive comment, an intentional erosion of the hearsay rule has been enacted England and Wales, resulting in the abolishing of the hearsay rule in civil cases and enacting a far less restrictive rule in criminal cases. The modification of the hearsay rule is grounded in recommendations of the Runciman Royal Commission, which

---

[657] R. v. Martinez-Tobon, [1994] 2 All ER 90, 98, 1 WLR 388, 397 C; R. v. Rhodes, [1899] 1 QB 77.

[658] Colin Tapper, Cross & Tapper on Evidence 49 n. 426 (10th rev. ed., LexisNexis UK 2004) *citing* DeLuna v. U.S., 308 F.2d 140 (1962) and R. v. Creighton, [1993] 3 S.C.R. 3, 80 C.C.C. (3d) 421; John Sopinka, Law of Evidence In Canada 143, 396 § 8 (2nd ed., Butterworths, Canada Ltd. 1999). In Canada the right to comment by a co-accused implicated by the defendant on the defendant's pretrial silence is accompanied by an instruction that inferences may not be drawn as to guilt by silence, but the silence may reflect on the defendant's credibility.

advocated the abolition of the exclusionary aspects of the rule and the application of the rule as a factor in weighing hearsay.[659] The Criminal Justice Act 2003 incorporated the recommendation of the Auld report that the rule be weakened so that hearsay would be admissible subject to the principal of the best evidence, rather than generally inadmissible.[660] The net result is that England and Wales has a different approach for hearsay in civil cases as compared to criminal cases. There is a wide open abolition of the rule in civil cases, and a more restrictive rule (albeit liberalized) in criminal cases. If the present government's most recent legislation to permit serious frauds trials to be tried by judge only goes into force, which rule will be applicable? Will there be further loosening of the hearsay rule in criminal bench trials? Does the bench trier of fact, with a more porous hearsay rule, engage in different weighing based on greater experience than the jury? Does the bench trier of fact have a duty to advise that hearsay will be discounted and the utterer should be produced given that conclusion will be reached in a non deliberative setting, with likely attempts by counsel to achieve brevity in a bench trial being weighed against the duty to fully and fairly present their client's case?

The law of England and Wales further diminished the longstanding common law right to silence by permitting prosecution for silence (or a failure to cooperate) when questioned during investigations of serious and complex fraud, "a clear exception... to the rule

---

[659] Viscount Runciman, The Royal Commission on Criminal Justice ch.8, ¶¶ 26-28 (HMSO 1993) hereinafter Runciman Commission.

[660] Lord Justice Robin Auld, Review of the Criminal Courts in England and Wales ch. 11 ¶ 104, 282 ¶ 4.31 (Sept. 2001), available at http://www.criminal-courts-review.org.uk (hereinafter, The Auld Report) ("in this respect, as with evidence in criminal cases generally, moving away from rules of inadmissibility to trusting fact finders to assess the weight of the evidence"). Criminal Justice Act, 2003, c. 44, §§ 114-116.

against compelling a witness to answer questions".[661] A person who refuses to answer questions posed by the Serious Fraud Office (SFO) may be prosecuted and sentenced to up to six months in prison. The only meaningful protection provided by the statute to the interrogated person is that any answers given cannot be used against the person questioned "unless they change their story".[662] However a specific judicial instruction is required regarding the defendant's silence.[663]There is no comparable provision in either the U.S.A. or Canadian law.

II. The Role of the Judge

The role of the Judge expands in non-jury trials because he/she becomes the trier of fact as well as the trier of law. It is important to understand how the expanded role impacts, if at all, on the workings of the trial. The main issue, therefore is, does the expanded judicial role in a bench trial create distinctly different substantive evidentiary rules from a jury trial causing the selection of a mode of trial also to be a selection of the rules of evidence applicable to the case?

One view is that bench trials so differ from jury trials that there should be modified evidentiary rules in America for non-jury trials, particularly regarding exclusionary rules, formalizing the present *de facto* relaxation of the rules of evidence in bench trials. The reasoning is that rules like the hearsay rule are created for the benefit of the untrained

---

[661] Criminal Justice Act, 1987, c. 38, § 2 (8); The Runciman Royal Commission, *supra* note 660, at 56.
[662] Criminal Justice Act, 1987, c. 38, § 2 (8).
[663] Criminal Justice & Public Order Act, 1994, c. 33, §§ 34-38; R. v. McGarry [1991] 1 Cr. App. R. 377 (requiring an appropriate judicial direction (instruction) in every case regarding the defendant's silence).

juror, and that trial and appellate courts already conclude that the legally trained jurist need not be encumbered by such technicalities.[664] A branch of this argument maintains that trial judges, because of their legal training, are able to set aside prejudicial information that might be learned from rulings to exclude evidence or from plea/settlement negotiations.[665] The ability of judges to set aside prejudice and/or to reason free of prejudice was evaluated by psychological testing which examined judicial decision making to determine if the subject judges were susceptible to cognitive illusions. The results suggest that judges demonstrate an egocentric bias, defined as a disproportionate sense of their ability to evaluate situations and contend with them.[666]

However, the same study also found that:

> "Judges are also in a better position to determine whether evidence is relevant. Relevance is largely a statistical concept that is easily misunderstood. Judges are less likely

---

[664] Kenneth Culp Davis, *An Approach to Rules of Evidence for Non-Jury Cases*, 50 A.B.A.J. 723, 724 (1965), *The Report of the Special Committee on Evidence of the Judicial Conference of the United States* 4 (1962) which observed that there was "the general principle that the law of evidence is relaxed in cases tried without a jury".

[665] For example, in England and Wales, in Wetherall v. Harrison, [1976] Q.B. 773, 1 All ER 241, 244, Lord Widgery C.J. stated "Laymen . . . sitting as justices . . . lack the ability to put out of their minds certain features of the case. . ."; and Rose L.J. in Lilley v South Worcestershire Justices, [1995] 4 All ER 186, [1995] 1 WLR 1595, *ex* P. Lilley, (1995) 1 W.L.R. 1995, 1998 "[J]udges, unlike lay justices, are lawyers who have had many years of training in the art, if art it be, of excluding from their consideration irrelevant and inadmissible material.". *See* Martin Wasik, *Magistrates: Knowledge of Previous Convictions*, [1996] Crim. L. R. 851, 851 n.3; This view is widely followed in the United States as we will see later in this chapter in the section regarding Appellate Review of bench verdicts, Davis, *supra* note 6654, is of this view, it permeates the four corners of his article.

[666] Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 68 Cornell L. Rev. 777, 828 (2001). Heuristics according to psychologists are mental shortcuts humans rely upon to make complex decisions. *Id.*, at 815.

> to rely on heuristics like representativeness that can lead to erroneous evidentiary determinations."[667]

This conclusion provides support for the present arrangement in England and Wales which does not permit magistrates (non lawyers) to try a defendant if they have learned of a criminal record, but does allow judges to sit on jury trials where the judge is fully aware of the defendant's criminal record.[668]

Coupled with Andrew Leipold's suggestion that federal bench trial conviction rates have dramatically declined due to the general attitude of Federal District Court Judges that mandated sentencing guidelines are draconian, the comparator countries may have a misplaced comfort level about judicial capacity to maintain objectivity in light of prejudicial information.[669]

Judicial recollection or memory may not be superior to that of the jury. Weighing perceived strengths and weaknesses of jury as compared to judge decision making, one analysis of the accuracy of juror memory found that individual jurors had memory problems but that collectively jurors remembered 90% of the facts and 80% of the

---

[667] Chris Guthrie et al., *Id.*, at 826. The Representative heuristic is defined as "when people make categorical judgments ..., they tend to base their judgments on the extent to which the evidence being analyzed (e.g. the defendant's demeanor) is representative of that category". *Id.*, at 805. Thus, the authors, for example, assert that jurors are more likely than a judge to assume that a person in court who is nervous or appears guilty is guilty, and a defendant who is at ease is not guilty.

[668] Martin Wasik, *supra* note 665, at 851, *citing* Paul Carr & Adrian Turner, Stone's Justice's Manual ¶¶ 1-39 – 1-45 (17th ed., London: Butterworths Law 1996), and Wetherall v. Harrison, [1976] Q.B. 773, 1 All ER 241.

[669] Andrew D. Leipold, *Why are Federal Judges So Acquittal Prone?*, 83 Wash. U. L. Q. 151, 211-213 (2005). The argument is that judges as triers of fact should not acquit guilty people because they believe the mandatory sentence is too harsh. Juries are not told the sentence for that very reason. Why should the "trained" judge be accorded that luxury?

judge's instructions.[670] The judge in a bench trial will have the advantage of a longer deliberation period (they do not have the obligation to render an immediate verdict) and greater access to the trial transcript, but the judge may not have a significant advantage, if any, regarding accurate knowledge of the facts given the collective reasoning and memory demonstrated by jurors.

The ultimate conclusion reached by the American school of thought favoring less restrictive evidentiary rules for bench trials is that hearsay should be weighed and not excluded comparable to the existing system in England and Wales, consistent with the notion that non-jury trials allow for an expansion of admissible evidence because the trier of fact is a trained professional.[671]

Trials in all of the comparator jurisdictions are conducted in the adversarial adjudicatory mode. According to Doran, Jackson and Siegel, in the American bench trial there is a loosening of evidentiary rules and procedures that affects the quality of adversarial adjudication.[672] In part buttressed by the earlier work of Doran and Jackson regarding Diplock trials in Northern Ireland, the authors argue for the creation of protections during non-jury trials which would mirror or at least closely reflect jury trial safeguards, including:

---

[670] R. Hastie, S. Penrod, & N. Pennington, Inside the Jury, 135-137 (Harvard U. Press 1983). This was a simulation study and not an evaluation of actual jurors.

[671] Davis, *supra* note 664, at 725, *quoting* Judge Learned Hand "the test of sufficient evidence should not be jury trial rules of admissibility but should be "the kind of evidence on which responsible persons are accustomed to rely in serious affairs". National Labor Relations Board v. Remmington Rand, 94 F.2d 862, 873 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938).

[672] Sean Doran, John D. Jackson, & Michael L. Siegel, *Rethinking Adversariness in Non-Jury Criminal Trials*, 23 Am. J. Crim. L. 1, 27 n.8 (1999).

1) Enforcing evidence rules at bench trials more formally;
2) Have pretrial exclusionary hearings before a judge who will not be the trier of fact;
3) More control over judicial intra-trial inquisition;
4) The requirement of a reasoned judgment;
5) The delivery of a provisional statement of guilt that is open to consideration and argument;
6) Discontinuance of an appellate abandonment to judicial decision making wherein Appellate Courts credit the trial judge with discounting evidence improperly admitted in a bench trial.

The rules for bench trials advocated by Doran, Jackson, and Siegel on the one hand and by Davis on the other, offer a useful framework for the comparison of the rules of evidence in judge and jury trials. A survey was conducted of New York State trial judges and members of the American College of Trial Lawyers who practice in New York State regarding many of these issues the results of which are reported in Chapter 8. Many of these issues were also discussed with England & Wales judges as reported in Chapter 9.

III. Rules of Expert Evidence

How experts testimony is customarily treated in a mode of trial can be crucial to selection of that mode of trial. Significant variation in rules between the modes of trial creates a potential disparity that would assault the shared objective in all of the comparator

jurisdictions that the mode of trial not influence the substance of the trial and consequently the outcome. The rules for admission of expert testimony in each mode of trial are important predicates to mode of trial decision making because "disagreement plays an inevitable role in science, just as it does in law".[673]

A. Jury Trials in America

Experts are crucial players in most complex fraud cases. Areas of expertise can range widely, based on the facts of the case, with accountants, handwriting experts, computer and system analysts, banking system analysts regularly providing court room opinions.

In England and Wales there are different hearsay rules for civil (non-jury) cases as compared to criminal trials and significantly different expert rules.[674] In America the bench trial has an entirely different common law application of expert testimony, with American judge-only courts allowing otherwise impermissible testimony, a phenomena that will be explored more fully in this section.[675]

The choice of mode of trial therefore may crucially impact the rules under which expert testimony will be conducted. It is therefore essential to examine the existing state of evidentiary rules regarding expert testimony.

---

[673] Mike Redmayne, *Expert Evidence and Scientific Disagreement*, 30 U.C. Davis L. Rev. 1027, 1080 (1997). Dr. Redmayne notes that the legal application of science in the courtroom tends to exacerbate differences between scientific schools of thought. A case which has strong scientific differences may be tried in a very different way before a judge as trier of fact in America, who will likely hear both schools, rather than to a jury where the U.S.A. judge will apply the Daubert or Frye tests to determine what scientific view will be presented to the jury. Daubert and Frye will be discussed at length *infra*.

[674] Adrian Keane, The Modern Law of Evidence 572-583 (6th ed., Oxford U. Press 2006).

[675] *See* Seaboard Lumber Co. v. U.S., 308 F.3d 1283 (Fed. Cir. 2002).

1. Expert Witnesses -- Novel, New, and All That Junk and the Boiling American Dispute Between Frye and Relevance.

With the advent of Daubert v. Merrell Dow Pharmaceuticals in 1993, the United States Supreme Court provoked even more confusion in the comparator jurisdictions.[676]

The Daubert decision, grounded on Federal Rule of Evidence Section 702, requires judges to review novel science or novel applications of established science to ascertain whether the basis for the testimony has scientific acceptance based on peer reviewed literature, scientific testing, general acceptance of the theory and potential known rate of error.

The Frye test of general acceptance and the more longstanding relevance test were the two standards commonly applied by the courts in the comparator jurisdictions as experts became crucial courtroom players in the second-half of the twentieth century. The Federal Rules of Evidence Sections U.S.C.S. Fed. R. Evid. 701-706 (206), and Section 78 of the Police and Criminal Evidence Act of 1984 were statutory attempts to regulate the use of experts in response to emerging legal trends. As we will see below, the Canadian common law and the case law in New York and California seek to achieve the same regulation. However, many commentators including David Bernstein argue that both standards applied collectively and individually were less than effective in achieving the

[676] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 2792 (1993).

proper monitoring of expert testimony and that scientifically questionable testimony was infecting trials.[677]

During the second half of the twentieth century, American courtrooms were at the cutting edge of the modern explosion of expert testimony. Tort cases in such complicated fields as products liability and medical malpractice turned civil jury trials into virtual science fairs.[678] Criminal trials also became a battle ground dominated by experts in well worn areas such as forensic accounting,[679] handwriting and fingerprint experts, voice print experts, forensic medical experts, biomechanists, ballistic experts, as well as new areas such as crime scene reconstructionists, blood stain spatter specialists, microscopic hair comparison experts, and ultimately DNA experts.[680]

The genesis of the modern debate over admissible scientific opinions occurred with issuance of the decision in Frye v. U.S., in which the District of Columbia Circuit Court

---

[677] David E. Bernstein, *Junk Science in the United States and the Commonwealth*, 21 Yale J. Int'l L. 123 (1996).

[678] Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 71-72 nn.65-67 (2001).

[679] Kenneth D. Ackerman & Boss Tweed, The Rise and Fall of the Corrupt Pol. Who Conceived the Soul of Modern New York (1st Carroll & Graf Trade Pbk. ed., Carroll & Graf Publishers 2005). An early use of forensic accounting was in the major serious fraud trial of the late 19th century, the graft and corruption trial of William M. (Boss) Tweed who stole from the City of New York coffers up to a quarter of a billion dollars. His defalcations were documented by Attorney Samuel Tilden, who testified using a complex chart about Tweed and his cronies engaging in money laundering of public funds through bogus corporations or overpaying legitimate bills. *Id.* at 236-240.

[680] Barry Scheck, Peter Neufeld, & Jim Dwyer, Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted, 161-167 (Doubleday 2000). Labeling the Frye rule a "witless echo chamber", the authors applauded the *Daubert* notion of the judge as gatekeeper, maintaining that for example expert opinions correlating bite marks with human teeth was unreliable and that 29% of wrongful convictions studies by their project included incorrect hair analysis of microscopic hair comparisons. *See also*, David W. Barnes, *General Acceptance versus Scientific Soundness: Mad Scientists in the Courtroom*, 31 Fla. St. U. L. Rev. 303 (2004); 329-332.

in 1923 utilized a new standard for the acceptance of expert scientific testimony. Holding that the science propounded in court must be generally accepted in the field,[681] the Frye court inaugurated a departure from reliability as the basis for the admission of expert testimony. Other leading American jurisdictions such as New York followed the longstanding relevance of school of thought,[682] reasoning that "any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion".[683] According to Bernstein between 1923 and 1993 there was disagreement in the various American jurisdictions between relevance and general acceptance,[684] with Daubert emerging in 1993 to provide the "flexible reliability test focusing on whether the expert's testimony is based on the proper scientific methodology and reasoning".[685] The historical disagreement between relevance and general acceptance is further embodied in the Second Edition of McCormick on Evidence which quotes the key language of Frye:

> "Just when a scientific principle crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts

[681] Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923). The case involved the Court's rejection of a machine that was a primitive lie detector asserting that "the thing from which the diction was made must be sufficiently established to have gained general acceptance in the particular field which it belongs". As Bernstein, *supra* note 678, at n.15, Frye did not immediately receive wide acceptance of citation and thus its acceptance was "uncertain". That assertion is supported by a review of New York's leading text on Evidence, Richardson on Evidence. The 10th Edition published in 1973 cites Frye only once, in the section regarding the admissibility of evidence at page 358.

[682] Jerome Prince, Richardson on Evidence (10th ed., Brooklyn Law School 1973). The courts function is to determine the expert's qualification, the proper factual foundation, and the relevance of the testimony to the case.

[683] Charles T. McCormick, Handbook of the Law of Evidence 363-364 (1st Ed. 1954).

[684] David E. Bernstein, *supra* note 677, at 126.

[685] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 112 S. Ct. 2786, 2792 (1993) *cited by* David E. Bernstein, *supra* note 678, at 126.

> will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field to which it belongs."[686]

Noting that Frye did not cite any precedent for the general acceptance principle it pronounced, McCormick continued to embrace the relevance test, citing with approval Coppolino v. State, a case wherein a Florida Court upheld a forensic medical test, devised by a toxicologist, specifically for that trial which purported to determine the presence of a chemical compound in a corpse.[687] McCormick continued to embrace the relevance test in 1978:

> "Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion. Particularly probative value may be overborne by the familiar dangers of prejudicing or misleading the jury, and undue consumption of time. If the courts used this approach, instead of repeating a supposed requirement of "general acceptance" not elsewhere imposed, they would arrive at a practical way of utilizing the results of scientific advances".[688]

Indeed the Frye test was not a widely a utilized standard in many U.S. jurisdictions until the 1970s and 1980s.

2. New York, California and Daubert

Shortly after the U.S. Supreme Court handed down Daubert, the California Supreme Court in People v. Leahy reaffirmed the application of a Frye-like "Kelly test" which had

---

[686] Edward W. Cleary, McCormick on Evidence, § 1014 (2d ed. 1972). McCormick is one of the several leading American evidentiary source texts.
[687] Coppolino v. State, 223 So.2d 68 (Fla. Ct. App. 1969), *appeal dismissed*, 234 So.2d 120 (Fla. 1969), *cert. denied*, 399 U.S. 927 (1970).
[688] Cleary, McCormick on Evidence, *supra* note 686, *see* 1978 pocket part at 491.

been utilized since 1976.[689] That longstanding test held admissible new or novel scientific technique where there was the proffer of "foundational evidence disclosing general acceptance of the test within the relevant scientific community."[690] New York has maintained a comparable test of relevance, rejecting Daubert to date.[691] Other states like Florida follow Frye out of the belief that it is a more vigorous test than Daubert.[692]

B. Daubert, Frye, and the Application of the Rules in the American Bench Trials

In bench trials, the rigidity that some attach to the Daubert and Frye principles vanishes and evidentiary flaccidity prevails. As we will see later in this thesis, bench trials generally have more relaxed rules of evidence and far less stringent appellate review, particularly in the U.S. where the trial court may admit expert testimony that may not meet the Daubert standard and then discount it. For example, two Federal Appellate Courts have actually opined that the Daubert test provokes "concerns of lesser import in a bench trial",[693] "bench trials have substantial flexibility in admitting proffered expert testimony at the front end and then deciding for themselves during the course of the trial whether the evidence meets the requirements of Rule 702",[694] and one United States

---

[689] People v. Leahy, 8 Cal.4th 587 (1994); People v. Kelly, 17 Cal.3d 24, 549 P.2d 1240 (Cal. 1976).

[690] People v. Kelly, *supra* note 689.

[691] People v. Wesley, 83 N.Y.2d 417 (Ct. App. 1993). Edward W. Cleary, McCormick on Evidence 873-874 at § 293 (4th ed. 1992). Jerome Prince, Richardson on Evidence § 7.311 at 476 (10th ed., Brooklyn Law School 1973), citing People v. Allweis, 48 N.Y.2d 40, 49-50 (Ct. App. 1979); People v. Gupta, 87 A.D.2d 991 (N.Y. App. Div. 4th Dept. 1982). Edward Imwinkelried, *Coming to Grips with Scientific Research in Daubert's Brave New World: The Courts Need to Appreciate the Evidentiary Differences Between Validity and Proficiency Studies,* 61 Brooklyn L. Rev. 1247, 1251 (1995).

[692] David L. Faigman et al., Modern Scientific Evidence: The Law and the Science of Expert Testimony § 1-3.0 at 12-12 n.8 (West Info. Pub. Group 1997); Ramirez v. State, 810 So. 2d 836 (Fla 2001).

[693] Seaboard Lumber Co. v. U.S., 308 F.3d 1283 (Fed. Cir. 2002).

[694] Gonzales v. National Bd. Of Med. Examiners, 225 F.3d 620, 625 (6th Cir. 2000).

District Court reasons that it is acceptable "to admit evidence of borderline admissibility and give it the (slight) weight to which it is entitled."[695] This standard, of course, would be unacceptable in a jury trial in either a Daubert or Frye jurisdiction. Thus, it is apparent that even if relevance is not the main standard to be utilized regarding the admissibility of expert testimony in bench trials, it is a major temptation for the judge apply that standard in a bench trial, thus expanding the mode of trial choice to not only the trier of fact but also the evidentiary standard to be applied to expert testimony.

Surveys of New York State judges and lawyers discussed in Chapter 8 strongly suggest that bench trials are very different from jury trials. Both the judges and lawyers report that judges do not apply the rules of testimonial hearsay as vigorously in bench trials as in jury trials. Lawyers further opined that New York judges were not vigorous in the application of Daubert or Frye. This must be coupled with the fact that in New York State the trial judge generally decides, even in bench trials, potentially prejudicial motions such as: an application to have a hearing to determine if expert testimony will be permitted for the full range of reasons; lack of qualification or experience of the expert; an absence of a proper evidentiary foundation for the opinions proffered; a failure to fully and properly disclose the expert pursuant to the civil or criminal practice rules; and an absence of proper scientific basis for the testimony, such as meeting the Daubert or Frye standard. In each instance, even if the trial judge excludes the testimony, he/she will

[695] Smith Kline Beecham Corp. v. Apotex Cor., 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003).

have heard the substance of the opinions in the form of an exclusionary motion or hearing.[696]

The problem that is created by the disparity in application of evidence is obvious. If there is a choice of mode of trial, novel scientific evidence or the novel application of existing science each will be likely received at a bench trial while its receipt at a jury trial is problematic. The implications in terms of outcome are vast and therefore where there is a choice of mode of trial, the implications of that choice by the defendant must embrace the different standards of admissibility.

C. Canada Rejects the Daubert Approach

Comparable to California, in R. v. Mohan (per Judge Sopinka), the Canadian Supreme Court in 1994 adopted a test that would seem to combine Frye and Daubert but has also caused great confusion and uncertainty.[697] Mohan delineated a four part test for evaluating the admissibility of expert evidence:

1. evidentiary relevance;
2. the necessity of the evidence;
3. whether such evidence should otherwise be excluded;
4. whether the expert is properly qualified.[698]

---

[696] Chapter 8, *infra*, reports on the results of a detailed survey on this issue administered to New York State trial judges and attorneys.

[697] R. v. Mohan, [1994] 89 C.C.C. (3d) 402, 2 S.C.R. 9.

[698] *Id.* at 20; David E. Bernstein, supra note 678, at n.99, David M. Paciocco, *Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility: Lessons from the Law of Evidence*, 27 CR4th 302, 310 (1994). "[Frye] is not the law of Canada. Exactly what is, is not quite clear..."; R.J. Delisle, *The Admissibility of Expert Evidence: A New Caution Based on General Principles*, 29 C.R.4th 267, 272 (1994), *citing* R. v. Doe (No. 2) [1986] 31 C.C.C. (3d)

According to one view, R. v. Mohan stands for requiring a general acceptance standard, therefore the court rejected plaintiff's expert evidence in the form of psychiatric testimony opining that the defendant did not fit the profile of someone who would sexually assault a minor.[699] Bernstein and a leading Canadian scholar depart on which test the Canadian Supreme Court applied in deciding Mohan:

> "Sopinka's opinion did not cite any American case law on the issue of the admissibility of scientific evidence. Nevertheless, one scholar has argued that "[t]he court in Mohan appears to have arrived at the same position as the court in Daubert, though with decidedly less fanfare" because of the opinion's focus on the underlying validity of expert evidence. The opinion's heavy reliance on general acceptance, however, seems to be inspired by Frye more than Daubert."[700] (parenthesis added)

Reflecting the general confusion, Delisle opines differently, concluding that Mohan reaffirmed relevance as the standard:

> "In Canada, expert evidence will be received if it is relevant to a fact in issue, the expert is properly qualified, the expert evidence is helpful to the trier of fact, and there are no exclusionary rules in operation."[701]

---

353 (Ont. Dist. Ct.) (admissibility of polygraph opinion) and R. v. Johnston [1992] 69 C.C.C. (2d) 395, 12 C.R. (4th) 99 (Ont. Gen. Div.) (admissibility of evidence of identification by DNA profiling); David M. Paciocco & Lee Stuesser, The Law of Evidence 193 (Irwin Law 2005), *citing* R. v. J J-L [2002] 2 S.C.R. 600 (in which the Supreme Court of Canada acknowledges while it is not the only standard, general acceptance must be considered); David M. Paciocco, *Coping with Expert Evidence About Human Behaviour*, 25 Queens, L. J. 305, 317 (1999).

[699] R. James Williams, *Grasping a Thorny Baton . . . A Trial Judge Looks at Judicial Notice and Court's Application of Social Science*, 14 Canadian Fam. L. 179 (1996).

[700] David E. Bernstein, *supra* note 678, at 146; R.J. Delisle, *The Admissibility of Expert Evidence: A New Caution Based on General Principles*, 29 C.R.4th 267, 272 (1994). Bernstein quotes the *Mohan* decision's author, Justice Sopinka, in n.153, a quote which indicates Mohan did not adopt a single test but "rather, the Court's first apply the traditional exclusionary rules, the expert evidence rule, and then invoke policy reasons specific to the particular proffered evidence to determine admissibility. This appears to be the preferable route". John Sopinka, Law of Evidence In Canada 597 (2nd ed., Butterworths, Canada Ltd. 1999).

[701] R.J. Delisle, *supra* note 698, at 272.

One commentator has proposed practice rules comparable to those in place in England and Wales for civil litigation wherein the Court can order dialogue between the parties' experts and, in its discretion, appoint a court's expert.[702] There is little present enthusiasm for the application of this concept in the criminal law in England and Wales, the United States, or apparently in Canada, although a Federal judge pursuant to Rule 702 of the Federal Rules of Evidence may appoint the Court's own expert. This is not a general practice in criminal trials – such an appointment is rare.

While Daubert-like pretrial hearings (voir dire) are held in Canadian criminal cases, they are not utilized in Canadian civil cases.[703]

Thus the Canadian standard for the admission of expert testimony about novel science weighs the necessity of the testimony, provides special scrutiny of reliability and the closer the evidence about a novel scientific technique, "the stricter the application."[704]

The standard, as articulated, vests great discretion in the trial judge, either in a bench trial or jury trial. The standard is not nearly as restrictive as Daubert or Frye, thus the

---

[702] P. Brad Limpert, *Beyond the Rule in Mohan: A New Model for Assessing the reliability of Scientific Evidence*, 54 U.T. Fac. L. Rev. 65 (1996). Limpert calls for the systematic evaluation of scientific uncertainty setting forth 7 types of uncertainty which arises during empirical hypothesis testing.

[703] Tania M. Bubela, *Expert Evidence: The Ethical Responsibility of the Legal Profession*, 41 Alberta L. Rev. 853, 869 (2004).

[704] David M. Paciocco & Lee Stuesser, *supra* note 698, at 194, *quoting* R. v. J J-L, [2000] 2 S.C.R. 600, ¶ 37.

concerns that mode of trial choice will impact on whether or not an expert will be allowed to testify are minimal in Canada.

D. England and Wales

Will the judge only trials so eagerly sought by the government in certain serious frauds cases receive expert testimony in a manner more consistent with the civil procedure law?[705] Will there be greater reliance on §30 of the Criminal Justice Act, 1988, thereby foreclosing defendant's opportunity for cross-examination of experts? Given that a "striking feature of English law is its liberal – according to one commentator 'incredibly liberal' approach to the reception of novel forms of scientific expertise," a bench trial which employs civil rules will likely be very different from a jury trial.[706] And as Chapter 9 will describe in detail, a significant number of serious fraud qualified judges interviewed believe that a judge only criminal trial will resemble civil bench trials.

Therefore the questions posed above are relevant to the consideration of non-jury trials for serious frauds and are salient to the argument of this thesis that the defendant should be entitled to choose the mode of trial. No answer is offered in the proposed legislation currently pending before parliament.[707] Nor does the research paper accompanying the bill offer any detail regarding the evidentiary or procedural format for the judge only

[705] Part 35 of the Civil Procedure Law and the practice direction thereunder create a presumption that any expert evidence will be in writing, and § 35.7 permits the court to direct that evidence be given by a single joint expert. *See* Adrian Keane, The Modern Law of Evidence 572-583 (6th ed., Oxford University Press 2006).

[706] Paul Roberts & Adrean Zuckerman, Criminal Evidence 38-39, 323 (Oxford 2004), *quoting* David Ormerod, *Sounding Out Expert Voice Identification*, [2002] Crim L. R. 771, 777.

[707] Fraud (Trials without a Jury) Bill, 2006, Bill [6] of 2006-07 (Gr. Brit.), which is pending as of this writing, *available at* http://www.publications.parliament.uk/pa/pabills/200607/fraud_trials_without_a_jury.htm.

trials that would be conducted pursuant to the act.[708] Certainly the notion that a reduction in the cost of trial and the time expended would occur in bench trials suggest alternatives from jury trials.[709]

The recent (last thirty years) policy debate about the role of the expert witness in England and Wales has demonstrated a reluctance by Parliament or the Court of Appeal (Criminal Division) to modify the existing evidentiary standards for the admissibility of novel science or novel applications of accepted science.

Notwithstanding expert related miscarriages[710] and a rising tide of opinion advocating that English law abandon the relevance standard,[711] the Royal Commission on Criminal Justice declined to recommend either the abandonment of the relevance standard or the adoption of the reliability or general acceptance standards.[712] The focus rather has been

---

[708] Miriam Peck, The Frauds (Trials Without a Jury) Bill 2006-07, Research Paper 06/57 Home Affairs Section (House of Commons Library 2006), *available at* http://www.commonsleader.gov.uk/output/page1757.asp.

[709] *Id.* at 11.

[710] Preece v. H.M. Advocate, [1981] Crim. L. R. 783; R. v. McIlkenny, [1992] 2 All E.R. 417, 93 Cr. App. Rep. 287; R. v. Maguire, [1992] 1 Q.B. 936; R. v. Ward, [1993] 19 W.C.B. (2d) 239.

[711] Peter Alldridge, *Recognizing Novel Scientific Techniques: DNA As a Test Case*, [1992] Crim L. R. 687; Bernstein, *supra* note 677, at 169 nn.331, 330; R. v. Ward, 1 W.L.R. 619 (1993); Steven Greer, *Miscarriages of Justice Reconsidered*, 57 Mod. L. Rev. 58, 71-72 (1994) (role of forensic evidence in causing and correcting miscarriages).

[712] Viscount Runciman, The Royal Commission on Criminal Justice 160 (HMSO 1993). The report is silent with regard to any move from relevance to a reliability or general acceptance test. There is reference to Court being negligent regarding expert qualifications but not a regulatory role. "We see no need for a system of statutory certification or accreditation of expert witnesses nor for the maintenance of a register of experts by a government department". The Commission then calls for greater vigilance by professional bodies but make it clear that even if there is a certification process that judicial discretion should still be given deference. "We would not . . . go so far as to say that the Courts should necessarily exclude a witness who was not accredited under such a system", 160-161. *See* Mike Redmayne, *The Royal Commissions Proposal on Expert Evidence: A Critique*, 2 Expert evidence 157 (1994).

improving the credentials and consequently the credibility of experts, primarily as we will see below, through a process of witness accreditation.

Bernstein notes that "Despite the lack of change in common law rules regarding scientific evidence in England, there have been broader efforts to reform the forensic science system",[713] with substantial efforts pursuant to the Runciman Commission's recommendations to create more equality in the access to good quality forensic services for both the prosecution and the defense.[714] Dr. Chris Pamplin, the Editor of the U.K. Register of Expert Witnesses views government proposed schemes to accredit expert witnesses as not addressing real problems, labeling such proposals as "a convenient fig leaf for the government," and rather argues for a Daubert like pre-trial screening of the substance of expert testimony.[715]

Courts in England and Wales have not articulated either a Daubert or Frye-like test for the admission of expert testimony, remaining committed to a test that includes relevance, as well as a proper expert qualifications -- defined as a qualified expert offering an opinion on something that either is not within the knowledge of normal people or involves opinion outside the common ken.[716] One opinion is that R. v. Turner[717] and the

---

[713] Bernstein, *supra* note 700, at 170-174.
[714] Runciman Commission, *supra* note 712, at ch. 9, 144-161.
[715] Chris Pamplin, *Taking Experts Out of The Court*, 154 New L.J. 1771 (Nov. 26, 2004).
[716] William E. O'Brian, Jr., *Court Scrutiny of Expert Evidence: Recent Decisions Highlight the Tensions*, 7 Int'l J. Evid. & Proof 172 (2003).
[717] R. v. Turner, [1975] 1QB 834. Expert Testimony by a Psychiatrist was sought to evaluate witness truthfulness. Justice Lawton famously observed to paraphrase that if psychiatric testimony were to be permitted regarding the truthfulness of witnesses we would have trial by psychiatrists and not jurors. Thus, Turner has created a longstanding standard. *See also* Alldridge, *Scientific Expertise*, *supra* note 711 at 687.

common law on "the admissibility of expert evidence is regulated by the intersection of three sets of doctrinal standards: 1) relevance; 2) witness competence, 3) relevance plus expert evidence rules."[718]

The near unanimous view is that:

> "Although English law imposes some limits on the subject-matters of expert evidence, it has traditionally imposed very few limits on the methodology or reliability of expert testimony."[719]

The Court of Appeal has excluded expert opinion offered in new areas of science such as a psychological autopsy of a murder victim,[720] however they also have permitted expert lip-reading evidence.[721] With regard to psychological profile cases, Rose L. J. opined that the English approach was comparable to Frye, pointing out that on 17 occasions American Appellate Courts had overturned profiling cases:

> "The guiding principle in the United States appears to be (as stated in Frye v. U.S., [citation omitted]) that evidence based on a developing brand of science or medicine is not admissible until accepted by the scientific community as being accurate and reliable opinion. This accords with the English approach in the case as reflected in Strudwick and Merry."[722]

---

[718] Paul Roberts, *Tyres with Y: An English Perspective on Kumaho Tire and its Implications for the Admissibility of Expert Evidence*, 1 Int'l Commentary on Evidence 5 (1999), *available at* http://www.bepress.com/ice/vol1/iss2/art5.

[719] William E. O'Brian, Jr., *Court Scrutiny of Expert Evidence,* 7 Int'l. J. Evid. & Proof 172 (2003).

[720] R. v. Gilfoyle, (2001) 2 Cr. App Rep. 57, ¶25 (C.A.). The Court held the testimony was not admissible because the otherwise well qualified expert had never performed a psychological autopsy before and there was "no criteria by reference to which the Court could test the quality of his opinions, there is no data base comparing real and questionable suicides and there is not substantial body of academic writing approving his methodology." ¶25.

[721] R. v. Luttrell, [2004] E.W.C.A. Crim. 1344, 2 Cr. App. Rep. 520.

[722] R. v. Gilfoyle, (2001) 2 CR. App Rep. 57 CA; R. v. Strudwick, (1993) 99 Cr. App. Rep. 326. The issue was whether expertise called only for testimony about an abnormal mental state –

The Court of Appeal has ordered a retrial where evidence of an ear-print allegedly linking the Defendant to the crime scene was adduced at trial, opining that post trial expert evidence not available at trial demonstrated the unreliability of this type of expert opinion,[723] and has upheld voice identification testimony,[724] and has limited the use of the science of facial mapping:

> "To demonstrate to a jury with, if necessary, enhancement techniques afforded by specialist equipment, particular facial characteristics or combinations of such characteristics so as to permit the jury to reach its own conclusion.[725] This holding did not support an expert giving an opinion as to the degree of probability or likelihood of an affirmative identification because of the absence of rational data base, despite the Court in Re Attorney-General's Reference (No. 2 of 2002) opinion that a conclusion could be drawn by an expert in this area."[726]

The Crown Prosecution Service contends that in battered woman syndrome cases expert testimony is admissible for purposes like: opinion/explanations why the victim didn't leave the household she commonly occupied with the perpetrator; opinions about why the victim minimized the severity of the crime; and opinions explaining the victim's

---

mental illness. The Court per Judge Farquharson appeared to reject the admissibility of testimony as to abnormality.

[723] R. v. Dallagher, [2002] EWCA Crim. 1903, (2003) 1 Cr. App. Rep. 195. In this case the expert in the "novel technique of ear-print identification" had testified to an American Court and in the Netherlands – cases in which convictions based on that testimony were reversed. The Court of Appeal was apprised of these reversals and received the evidence of three experts denouncing the scientific basis of the expert's opinion. The Court opted to reverse the conviction not based on the experts lack of reliability but because he offered an opinion on the ultimate issue.

[724] R. v. Robb, (1991) 93 Cr. App. Rep. 161, even though "the great, great weight of informed opinion '"held that the technique used was unreliable"'; *see also* Tony Ward, *Expert Testimony Issues in the U.K.*, 17 Security J. 41 (2004) ("Traditionally in criminal jury trials, the Courts have taken the view that if the expert witness is "peritus" (skilled) in some area outside the experience of the jury, then his/her evidence is admissible 'the rest is merely a question of value or weight, and this is entirely a question for the jury'") *citing* R. v. Silverlock, (1894) 2 Q.B. 766, 771.

[725] R. v. Gray, [2003] EWCA Crim. 1001, ¶16.

[726] *Attorney General's Reference (No 2 of 2002)*, [2003] 1 Cr. App. R. 321, 327.

recanting of prior statements.[727] The Court of Appeal has permitted expert testimony by a social psychologist (who did not interview or examine the witness) that the nature of the personality of the witness is such that the jury would have difficulty evaluating that person's credibility.[728] One observer regards this decision as confirming that where the witness had an underlying medical condition, the jury may hear evidence which would set forth medical conditions which would impact upon the witness's credibility as opposed to testimony about whether or not the witness is credible.[729]

Most commentators believe that in criminal cases England and Wales is not moving toward a Daubert like formula or the embracing of Frye, but rather consistent with the Civil Procedure Rules would have all forensic experts regulated, as well owing a greater duty to the Court and empowering judges to require adverse experts to discuss their reports, while not advancing the civil concept of a court's expert for criminal cases.[730]

---

[727] Michelle M. Dempsey, *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence* The Crown Prosecution Service, 7 n.5 (2004) (contends that this type of testimony is admissible in New York State and California).

[728] R. v. MacKenney; R. v. Pinfold, [2003] E.W.C.A. Crim. 3643, [2004] 2 Cr. App. R. 32. The case, a 1981 conviction, was referred back to the Court of Appeal by the Criminal Cases Review Commission (CCRC).

[729] Paul Roberts, *Toward the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials*, 8 Int'l J. Evid. Proof 215 (2004).

[730] Tony Ward, *Expert Testimony Issues in the U.K.*, 17 Security J. 41, 46 (2004); The Auld Report, *supra* note 16, at ch. 11, ¶¶ 130-2, 140-1, 136, 145-6; Peter Alldridge *supra* note 774, at 152-153, identifies some of the problems associated with a court's expert including the likelihood of that witness's testimony receiving such an extreme weight from the jury as to impact upon the adversarial process.

R. v. Barnes provides a useful insight into the processes presently followed by English Courts in addressing novel expert testimony as the Court did not allow an arborealist's testimony because of qualifications to testify about finger print lifts.[731]

E. Summary

A common thread existent in all of the comparator jurisdictions is the recognition that expert testimony requires careful monitoring by the judicial system, whether in the form of an accreditation process or through the application of pretrial evidentiary screening as indicated by Frye or Daubert.[732]

Presumably in a circumstance where the defendants could choose the mode of trial, there would be clarification as to the procedural rules applicable to expert testimony, so that the defendant would be assured that prosecution experts would be produced and that proper cross-examination would occur pursuant to jury rules in a bench trial. One could also hope that if the present effort to pass legislation permitting the trial of serious fraud cases in England and Wales, that either legislatively or by direction from the Court of Appeal the evidentiary rules for bench trials will be clarified.

---

[731] R. v. Barnes, [2005] EWCA Crim. 1158 (C.A. Crim Div.); [2006] A.J. No. 409, 2006 ABPC 82, 2006 AB.C. LEXIS 401.

[732] David Bernstein, *supra* note 677, at 171; Christopher Oddie, Science and Administration of Justice 15, 43 (1991); Peter Alldridge, *supra* note 711, at 694-695, calling for a committee or extra-judicial entity to decide novel science questions; Russell E. Stockdale [1991] *Running with the Hounds*, 141 New L. J. 772, 774; M. Neil Browne, Carrie L. Wilkinson, Linda L. Williamson & Linda L. Barkacs, *The Perspectival Nature of Expert Testimony in the United States, England, Korea, and France*, 18 Conn. J. Int'l L. 55, 91 (2002).

IV. Hearsay

The inconsistent application of hearsay in bench trials poses a problem for anyone who believes that the bench trial should be comparable to the jury trial in the U.S.A. In England and Wales as discussed above, the newly expansive hearsay rule poses significant questions regarding the application of the rule in bench trials if the movement to permit the trial of Serious Frauds cases by judge only prevails.

The general rule in American courts is that hearsay is inadmissible both in criminal and civil cases. There are a number of exceptions to that rule. The rule and its exceptions are more closely applied in jury trials than in bench trials.[733]

As discussed in the previous section of this chapter, with regard to expert testimony, the results of the survey conducted for this paper and reported in Chapter 8 suggests that judges are less inclined to strictly enforce the hearsay rules in bench trials in the U.S.A.[734]

---

[733] U.S. Fed. R. Evid. 803 summarizes the main exceptions to the hearsay rule including present sense impression, excited utterance, then existing state of mind, statements for purposes of medical diagnosis, recorded recollection, various business records and public records and certain exceptions regarding prior testimony where the declarant is unavailable to name a few. While applicable only to Federal lawsuits, it is a representative codification of the hearsay rule as applied in State Courts.

[734] *See* Chapter 8, *infra*.

In England and Wales, the hearsay rule is no longer exclusionary in civil cases, the admission of testimonial hearsay goes to weight.[735] However, notice prior to any trial is required in order to use the hearsay and the adverse party has remedies which include the calling of the utterer.[736] England and Wales permits a judge in a criminal case to permit into evidence the report of an expert who will not testify.[737]

Section 114 (1) d Criminal Justice Act 2003 gives the judge broad discretion to admit hearsay if "the court is satisfied that it is in the interests of justice for it to be admissible" based on ten factors set forth in Section §114(2). Likewise if the utterer is dead, unfit to testify for mental or physical health reasons, outside of the U.K., or intimidated the statement upon proper identification of the utterer, if otherwise admissible, shall be admitted.[738]

An English judge may exclude hearsay evidence otherwise admissible because the court deems it to be unfair pursuant to Section 78 Police and Criminal Evidence Act 1984 or because evidence is deemed a waste of time pursuant to Section 126 Criminal Justice Act 2003. Moreover, the judge may stop the case and direct an acquittal where the evidence is unconvincing pursuant to §125 Criminal Justice Act 2003. These prerogatives do not

---

[735] Civil Evidence Act, 1995, c. 38, § 1 , abolishes hearsay "a statement made otherwise than by a person while giving evidence in the proceeding which is tendered as evidence of the matter stated . . ." §4 (1)(2) gives the factors to be applied in weighing hearsay.

[736] Civil Evidence Act, 1995, c. 38, § 2, and Civil Procedure Rules, 1998, c. 35, § 22.4 both allow the adverse party to move for permission to cross-examine the maker of the statement and if granted that right and the maker is not produced, the hearsay shall be excluded.

[737] Criminal Justice Act, 1988, c. 33, § 530.

[738] Criminal Justice Act, 2003, c. 44, § 116 (1), (2); *see* Adrian Keane, The Modern Law of Evidence 281-83 (6th ed., Oxford University Press 2006) for an explanation of the prelude to this legislation.

appear to be as broad as Federal Rules of Evidence Section 404 which allows the court to determine that admissible evidence shall be excluded because the prejudice outweighs the probative value thereof.

American jurisdictions and the U.K. and Canada all have business record exceptions to their hearsay rule.[739]

To some, the hearsay rule is a useless inconvenience in bench trials. A prominent American commentator complained both at the time the Federal Rules of Evidence were first proposed in 1970, as well as after their adoption, that the rules did not carve out an exception so that in non-jury cases hearsay otherwise excludable in jury trials could be admitted and weighed by the judicial trier of fact (a proposal that is remarkably consistent with present English Civil System),[740] arguing as follows:

> "Because Rule 8-02 makes hearsay "inadmissible except as provided" and because nothing else provides for admitting in nonjury cases hearsay that would be inadmissible in jury cases, adoption of the proposed Rules of Evidence may mean that the widespread practice in nonjury cases of admitting technically inadmissible hearsay "for what it's worth" will have to be discontinued. This result would be unfortunate, since exclusion of relevant and reliable hearsay rests heavily on the jury system and may make little or no sense in a nonjury case, especially when the hearsay happens to be the best evidence obtainable on a question of fact that must be answered. Thayer called the law of evidence " a piece of illogical, but by no means irrational patchwork; not at all

[739] Criminal Justice Act, 2003, c. 44, § 117; U.S. Fed. R. Evid. 802 (6) (7) (8); John Sopinka, Law of Evidence in Canada (2nd Ed. Butterworths, Canada, LTD 1999) at ch. 18.
[740] Kenneth Culp Davis, *Hearsay in Non-Jury Cases*, 83 Harv. L. Rev. 1362 (1970).

> to be admired, nor easily to be found intelligible, except as a product of the jury system." Wigmore said that "any attempt to apply strictly the jury-trial rules of Evidence to an administrative tribunal acting without a jury is a historical anomaly, predestined to probable futility and failure." His remark seems equally applicable to judges without juries. McCormick was even more emphatic: "As rules they are absurdly inappropriate to any tribunal or proceeding where there is no jury." Admission without a ruling in a nonjury case does no harm and may be more economical than making a ruling. In jury trials, rulings must be made because the hearsay may prejudice the jury. In nonjury trials, the judge is equally exposed to the hearsay whether he admits it or excludes it. Yet the literal words of the proposed rules clearly prohibit the judge form admitting hearsay "for what it's worth" without ruling on its admissibility' this result of the rules may be more important that any other with respect to hearsay. A corollary to the position that judges should admit hearsay "for what it's worth" is what the Eighth Circuit in 1965 called the "well established" rule that "in nonjury cases the appellate court will not reverse on the basis of the admission of incompetent evidence, "unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made"."[741]

It should be noted that the suggested efficiencies associated with a softening of the hearsay rule may be offset in England and Wales by a widening of so called collateral cross examination against that witness reporting the hearsay, as the credibility of both the

[741] *Id.* at 1365-66, *citing* James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 509 (Boston: Little, Brown 1898); J. Wigmore, Evidence § 46 (3d Ed. 1940); McCormick, 5 Encyc Soc. Sci. 637 (644) (1931); *Joseph A. Bass Co. v. U.S.*, 340 F.2d 842, 845 (8th Cir. 1965).

utterer and the witness to the utterance are now subject to testing.[742] Does the weakening of the hearsay rule create an opportunity to place before the jury evidence and facts not capable of proper measurement for truth and accuracy by cross-examination? Does the present hearsay rule effectively regulate such an injustice? Can the hearsay rule be regulated so that it is applied equally in both bench and jury trials? The adoption of Criminal Justice Act 2003 has formalized the extensive discretion granted to the trial judge in the area of hearsay. It can be argued that based on that discretion, as to hearsay issues, it matters little whether the trial is a bench or jury trial – the judge will have broad discretion under Rule 803(24) to admit the hearsay if it is evidence of a material fact, more probative on the point than any other evidence which the proponent can procure through reasonable efforts and if the general purposes of these rules and the interests of justice will be served by the admission of the hearsay into evidence (obviously subject to proper notice to the adversary).[743]

> "The fact that judges are now legally empowered to admit much more hearsay than previously, in a greater range of circumstances, does not entail any general shift in judicial attitudes regarding the reliability of particular types of information or a lowering of the law's guard against the evidential infirmities of hearsay. In particular, and despite its roving commission, section 114(1) (d) is unlikely to be invoked to facilitate the admission of poor quality information on a regular basis, to condone evidentiary short-cuts for the sake of convenience, or to save poorly-prepared prosecutions from directed verdicts of acquittal. It is going to take a convincing argument, securely-founded on considerations of probative value and justice, to persuade a judge that hearsay evidence which cannot be brought within any of the discrete exceptions created or preserved by the CAJ 2003 should nonetheless be admitted in the interests of justice under section 114(1) (d)."[744]

---

[742] Criminal Justice Act, 2003, c. 44, § 124 (Credibility).
[743] Paul Roberts & Adrean Zuckerman, Criminal Evidence (Oxford, 2004) at 662-63.
[744] *Id.* at 663.

With regard to documentary hearsay, Roberts and Zuckerman predict that 117 of the CJA 2003 will not result in "audit mentality" toward the admissibility of documents but that trial court will likely be required to have "conspicuous regard for the letter of the statute" in order to avoid Court of Appeal reversal.[745]

Interviews conducted for this paper with nine judges who try serious fraud cases obtained their agreement that while the hearsay rules have been greatly broadened, the judges, aware of that, are willing to invoke their broad discretion to prevent unfairness. Several judges were of the firm opinion that the hearsay changes in Criminal Justice Act 2003 had not altered trial outcomes and that juries were most capable of balancing hearsay by weighing the circumstances in which it is offered.[746]

Rationalizing and standardizing the admission of hearsay between jury and bench trials is important to maintain the integrity of the legal system. Unequal standards, especially on hearsay, would give rise to the suggestion that one mode of trial would be more likely to allow potentially dispositive evidence than the other.

---

[745] *Id.* at 642.
[746] Author's interviews, Chapter 9, *infra.*

Michael Siegel calls for a best evidence hearsay rule, a concept that may offer the way forward to establish a standard applicable to both bench and jury trials in light of concerns about the present application of the rule:

> "The degree of consensus among twentieth century evidence scholars concerning the intellectual bankruptcy of the hearsay doctrine is nothing short of remarkable."[747]

Making a critique of the American rule which is relevant also to the liberalized England and Wales hearsay rule, Siegel argues that cross examination of non-declarant witnesses is likely to be ineffective, reasoning that the witnesses heard what they heard and will likely be unshakable in that recollection. Moreover he asserts that calling the declarant is also likely to be an ineffective strategy as "In the majority of cases, however, the essence of the declarant – witnesses testimony would remain damaging to the opponents cause; it would make little sense for the opposing party to suffer through an in-court repetition of this testimony merely for the sake of impeachment".[748] In addition under the weakened rules the declarant may be unavailable, thereby rendering it impossible to impeach the hearsay.

Siegel concurs with Nesson's argument that enforcing a hearsay rule helps to promote the stability of verdicts and public confidence in the process.[749] However he also agrees with Park that the stability argument is undercut by exceptions to the hearsay rule and the

---

[747] Michael Siegel, *Rationalizing Hearsay: A Proposal for a Best Evidence Hearsay Rule*, 72 B.U.L. Rev. 893, 894 (1992), *see* n.5 for a review of those agreeing.
[748] *Id.* at 920.
[749] Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357 (1985).

possibility that the declarant not called at trial whose declaration was consequently excluded will post trial articulate evidence that will undercut the verdict.[750]

Lempert and Saltzburg argue that a loosening of the hearsay rule would favor rich and powerful Defendants in civil cases and prosecutors in criminal cases,[751] a position that Siegel asserts is unsupported by any objective evidence, "Who would benefit more from the abolition of the hearsay rule, organization or underdog, is impossible to predict".[752]

Siegel's proposed best evidence hearsay rule has some elements that are comparable to Chapter 2 of Criminal Justice Act 2003 (entitled Hearsay Evidence) and to some sections of the Federal Rules of Evidence.[753] He proposes six rules, which are compared below to specific sections of Criminal Justice Act 2003 and the Federal Rules of Evidence:

1) Except as otherwise provided, the live testimony of an in court witness is the best evidence of the asserted content of such testimony. This is similar to 114(6) CJA 2003.

2) Hearsay is the "best evidence" when the declarant is physically unavailable, as by reason of death, disability assertion of privilege or refusal to attend the proceeding from beyond reach of process. This is comparable to 116(1)(2) CJA 2003.

3) Hearsay is the best evidence when the identity of the declarant is unknown and cannot be discovered through diligent inquiry. This branch of the rule would allow a probative shout from the crowd to be admissible even if the declarant cannot be identified. There does not appear to be a Chapter 2 CJA

---

[750] Roger Park, *The Hearsay Rule and the Stability of Verdicts, A Response to Professor Nesson*, 70 Minn. L. Rev. (1986).
[751] Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 523 (2nd ed. 1982).
[752] Michael Siegel, *supra* note 747, at 926.
[753] The Auld Report proposed a best evidence hearsay rule, recommending that hearsay be admissible if the original source or best evidence is not available. *See* Review of the Criminal Courts of England and Wales, *supra* note 16; *see also* Adrian Keane, *supra* note 674, at 282-283.

2003 provision that is comparable, indeed the CJA requires the declarant to be identifiable, no more applicable rule under the Federal Rules of Evidence.

4) Hearsay is the best evidence when the judge determines that the pertinent asserted material will not be found in the memory of a reasonable number of declarants. Again there is no comparable provision in Chapter 2 CJA 2003, although Siegel asserts that this provision expands upon FRE 803(6) and is comparable to Section 117 CJA 2003. Regarding business and other documents, each requires a foundation as to reliability. This rule would permit the admission, for example, of telephone books and collaborative financial documents, if there is not any one source available with a meaningful recollection of the hearsay material.

5) Hearsay is the best evidence when it is an aggregate representation of the judgment of a large number of anonymous individuals. The judge may require an appropriate foundation witness. FRE 803 and 117 CJA 2003 are comparable.

6) Hearsay is the best evidence when the judge cannot possibly expect that the declarant will cooperate on the witness stand with the hearsay proponent because the declarant is an opposing party or strongly identified with an opposing party. This is comparable to 114-116 of CJA 2003. The Federal Rules of evidence have no comparable provision.

Siegel advocates intra-trial and post-proof judicial jury charges which would warn the jury about the hidden dangers of hearsay, including a charge regarding the declarant's motive when the declarant appears to contradict the hearsay. He also suggests a missing witness charge to be utilized in those cases where the declarant's actual unavailability can be credibly disputed.[754]

The application of such a rule makes sense if the comparator jurisdictions are to calibrate jury proof to judge only trials and would provide a more rational scheme than the present erosion of the hearsay rule in bench trials.[755] The creation of such a scheme both in the

[754] Michael Siegel, *supra* note 747, at 939, 940.
[755] Kenneth Culp Davis, Hearsay in Non-Jury Cases, 83 Harr. L. Rev. 1362, 1367-1368, citing with approval the relaxation of evidentiary rules in bench trials. Builders Steel Co. v.

U.S.A. and England and Wales would give the defendant the opportunity to be reasonably certain before choosing the mode of trial that in choosing either a bench or jury trial that hearsay problems would be given the same treatment. Many of the England and Wales judges surveyed believed the Criminal Justice Act 2003 expansion of the hearsay rule is not a factor in case outcomes and consequently unlikely to weigh in mode of trial considerations.[756] Of course, a central concern in the United States is that a bench or jury trial rule change regarding hearsay satisfy the confrontation clause of the United States Constitution.[757] One commentator has noted that "any reform which eliminated the exclusion of hearsay as a general premise and replaced it with a general rule of admissibility would raise serious constitutional questions."[758] At the same time the U.S. Supreme Court has upheld a number of exceptions to the hearsay rule over the years.[759] The court has not given judges carte blanche in bench trials, for example, reversing a conviction where the judge in a bench trial relied on hearsay testimony as the sole basis for proving one of the elements of a crime.[760]

As we will see later in this Chapter, Appellate Courts in America and England and Wales give bench verdicts and judicial evidentiary rulings in bench trials wide berth. The American trial judge in bench trials frequently does not rule on key evidentiary issues

---

Commissioner, 179 F.2d 377 (8th Cir. 1950); Samuel H. Moss, Inc. v. FK, 148 F2d 378 (2d Cir.) *cert. denied*, 326 U.S. 734 (1945); U.S. v. United Shoe Machinery Corp., 89 F.Supp. 349 (D. Mass. 1950) later disposed of without reference to the Court's admission into evidence a large number of hearsay documents in a civil bench anti trust trial, U.S. v. United Shoe Machinery Corp., 110 F.Supp 295 (D. Mass 1953), *aff'd*, 347 U.S. 521 (1954)

[756] Author interviews with 9 judges ticketed to try serious frauds cases (March-April, 2007). *See* Chapter 9, *infra*.

[757] U.S. Const. Amend. VI.

[758] Note: *Erosion of the Hearsay Rule*, 3 U. Rich. L. Rev. 89 (1969).

[759] *Id.* at 150 n.20.

[760] Moore v. U.S., 429 U.S. 20 (1976).

only to be given the appellate benefit of the doubt. Canadian common law appears to call for articulated rulings on evidence but not necessarily until rendering the final decision.[761] A best evidence hearsay rule in the U.S. and England and Wales coupled with a requirement to rule and explain in bench trials would give those events in America a more comparable standing with jury trials. In England and Wales, judge only trials on indictment if adopted should include these requirements.

V. Previous Convictions, Conduct and Bad Character

A record of prior convictions casts a long shadow over the trial preparation process on behalf of the accused in all of the comparator jurisdictions.

A defendant with a prior criminal record but a substantial defense may be more likely to choose a judge-only trial based on logic as well as jury research conducted in Canada and observation and research in other jurisdictions.[762] The hope would be a judge would be more likely to put aside the prior history particularly in light of a sound defense.[763] In serious fraud and other cases in England and Wales, Canada, and the U.S.A., therefore,

---

[761] R. v. Sheppard, [2002] S.C.C. 26, 1 S.C.R. 869; R. v. Braich, [2002] S.C.C. 27, 1 S.C.R. 903 (regarding important legal decisions made during a bench trial), *see* R. v. Chappell, [2003] 172 C.C.C. (3d) 539, 15 C.R. (6th) 350 (Ont. C.A.).

[762] A.N. Doob & H.M. Kirschenbaum, *Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act Upon an Accused*; 15 Crim. L. Q. 88, 88 (1972), *citing* M.L. Friedland, *Comments–Commentaries*, 47 Canadian Bar Rev. 656, 656-662 (1969), and H.L. Teed, *The Effect of S.12 of the Canada Evidence Act upon the Accused,* 13 Crim. L. Q. 70-8 (1971); Valerie P. Hans & A.N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L. Q. 235, 251 (1975), (concluding that, "The present research leaves little doubt that knowledge of a previous conviction biases a case against the defendant."). Mike Redmayne, *The Relevance of Bad Character*, 61 Cambrdg. L.J. 684 (2002); Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, [2000] Crim L. R. 734.

[763] Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 68 Cornell L. Rev. 777 (2001).

one might hypothesize that a defendant with such a history would find a bench trial attractive for that reason alone. Several England and Wales judges interviewed offered that CJA 2003 had sufficiently broadened the admissibility of the conduct of the accused that a bench trial might be an attractive mode of trial choice because life style evidence (high living) might prejudice the jury.[764]

Section 99 of the Criminal Justice Act 2003 eliminated the long-standing England and Wales rule that either prior bad acts and/or bad character[765] "is *prima facie* inadmissible for the purpose of showing that he or she committed the offense charged".[766] While prior convictions historically could be used to confront the testifying defendant, trial judges retained discretion regarding the scope of such a cross-examination.[767] The CJA 2003 abolishes those common law rules,[768] codifies a broad definition of bad character,[769] and creates seven ways in which the bad character evidence can be permissible, thereby greatly expanding the common law.[770] Relevant to admissibility under this statutory

---

[764] Author interview with 9 England and Wales Judges ticketed to try serious frauds cases, Chapter 9, *infra*.

[765] Paul Roberts & Adrian Zuckerman, *supra* note 743, at 504, define character as "relatively stable traits or dispositions".

[766] Runciman Royal Commission, *supra* note 659, at 125-126. Although a similar fact pattern in a prior conviction created a "similar fact exception. A further exception is the Defendant testifying to good character or impugning the character of other witnesses – in that event the prior convictions are fair game for cross-examination.

[767] R. v. Lawrence, [1995] Crim. L.R. 815 (C.A.).

[768] Criminal Justice Act, 2003, c. 44, § 99.

[769] Criminal Justice Act, 2003, c. 44, § 98.

[770] Criminal Justice Act, 2003, c. 44, § 101 a-b includes as factors party agreement, evidence adduced by the Defendant himself in questioning a witness or by the Defendant himself, is important explanatory evidence relevant to an important matter, has substantial probative value in relation to an important matter, is evidence to correct a false impression given by the Defendant or the Defendant made an attack on another person's character.

scheme is whether the explanatory evidence provides germane background information or is "extraneous conduct".[771]

The change is a recent development and thus cannot be factored retrospectively regarding outcomes. However, one must wonder how the English jury confronted with hearsay and evidence of prior conduct will weigh these factors. As reported in the prior chapter, several of the English judges interviewed thought that juries were frequently offended by prosecution's reliance on past bad acts, and that such evidence had little impact on the jury, but some research is to the contrary. That this type of evidence may not be as persuasive or prejudicial as many believe is supported by Redmayne's analysis of Lloyd-Bostock's study.[772] Rachlinski is not optimistic that judges would be unaffected by a prior criminal record, pointing out that "judges, like everyone else, are susceptible to illusions of judgment."[773] It may be quite different for fraud defendants than other defendants with a criminal record. Redmayne points out that Lloyd-Bostock reported that 66% of her mock jurors believed at the outset the defendant had a criminal record. He further points out that white collar crime is virtually seen as non-crime by the system and the public.[774] Thus we might infer the existence of a prior criminal record of a serious fraud defendant could have significant prejudicial effect due to the surprise factor.

---

[771] Paul Roberts & Adrian Zuckerman, *supra* note 743, 528-534.
[772] Mike Redmayne, *The Relevance of Bad Character,*61 Cambrdg. L.J. 684 (2002) at 698-710; Sally Lloyd-Bostock, *The Effects of Jurors hearing About the Defendant's Criminal Record,* [2000] Crim. L. R. 734.
[773] Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 Or. L. Rev. 61, 101 (2000).
[774] Mike Redmayne, *The Relevance of Bad Character, supra* note 772, at 698-699, 702.

The American rule as summarized in virtually all jurisdictions, is that prior bad acts or convictions are not admissible and thus, is quite different – the defendant may introduce his/her evidence of good character, but in doing so places prior acts and convictions squarely in issue:

> "The prosecution may not prove the defendant's bad character unless and until the defendant has introduced evidence of his good character. People v. Sharp, 107 N.Y. 427, 457, 14 N.E. 319, 338-339. This is a rule based on policy, not on logic, for obviously if the defendant's character is relevant to prove his innocence, it is equally relevant to prove his guilt. The very real danger of undue prejudice, that the jury might give excessive weight to evidence of the defendant's bad character, justifies the rule prohibiting the prosecution from initially attacking the defendant's character. *People v. Zackowitz*, 254 N.Y. 192, 172 N.E. 466."[775]

The Federal Rules of Evidence follow the general concept that questioning regarding character or prior bad acts is subject to a balancing test of whether or not the probative value outweighs the prejudice.[776] A comparable rule is in effect in California, with the following applicable sections of the California Evidence Code reviewed by the California Supreme Court:

> "As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. But, except for purposes of impeachment , such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion, unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) *other than a*

[775] Jerome Prince, *supra* note 682, at 147. Another rare caveat that would permit the introduction of other crimes is the defense of accident or mistake. Thus if the fraud alleged is defended on the notion that it was a mistake or error, prior convictions would be fair game.

[776] Fed. R. Evid. 609.1 Prior convictions are admissible within 10 years and may be admissible after 10 years if proper notice is given and the Court concludes probative value outweighs the prejudice.

> *disposition to commit such an act.* Under section 1102, defendants in criminal cases may introduce evidence of their character or character traits to prove their conduct in conformity therewith, and the prosecution may use similar evidence to rebut that evidence.
>
> In 1995, the Legislature enacted section 1108 to expand the admissibility of disposition or propensity evidence in sex offense cases. Subdivision (a) of that section provides in pertinent part that "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352 [permitting court to exclude evidence on weighing probative value and prejudicial impact]." The section also provides for pretrial notice to defendant of the evidence to be offered, disclaims any intent to limit admission of evidence under other provisions, and defines the various terms used in the provision. In 1996, the Legislature added a similar provision to allow admission in domestic violence case of evidence that the defendant committed other acts of domestic violence."[777]

Under the American rule, the introduction of evidence of the prior similar crime when relevant to motive or to prove intent may be permitted and if it is a crime of dishonesty, no balancing test is required under the Federal Rules of Evidence.[778]

Section 12 of the Canada Evidence Act provides that the criminal record of an accused person who testifies in his own behalf can be the subject of cross examination and if denied, entered into evidence. While the jury is instructed that "evidence of previous convictions should be used to determine the credibility of the accused and not his guilt,

[777] People v. Falsetta, 21 Cal.4th 903, 911 (1999). The Court upheld the statute and the test. Thus in California a prior conviction for sexual conduct may be introduced to show propensity in the Court's discretion.

[778] Jerome Prince, *supra* note 682, at 141-142. Fed. R. Evid. 609.1.

the Section is nonetheless unfair to the accused"[779] because research indicates that defendants' are more likely to be convicted when a prior conviction is disclosed and multiple convictions result in an even higher percentage of convictions.[780]

Even more broadly, Section 12 permits a witness to be cross examined regarding discreditable conduct.[781] The court may limit the use of prior convictions subject to its discretion when the prejudice outweighs the probative value.[782]

The Canadian Supreme Court attempted to clarify in R. v. Handy the admissibility of similar facts but rather only succeeded in confusing the issue according to Redmayne. The rule appears to be that specific propensities but not general propensities are admissible.[783]

Because it is a widely held belief in all jurisdictions that jury knowledge of the prior criminal record or prior similar acts of the defendants is devastating for the defendant, a bench trial may be the more attractive mode of trial to defendants with prior records.[784] Particularly under the newly adopted expansive rule in England and Wales, a defendant

---

[779] A.N. Doob & H.M. Kershenbaum, *supra* note 762, at 88 *citing* M.L. Friedland, *supra* note 763 and H.L. Teed, *supra* note 763, at 70-8.
[780] *Id.*; Valerie P. Hans & Anthony V. Doob, *supra* note 762, at 251 (concluding that "The present research leaves little doubt that knowledge of a previous conviction biases a case against the defendant").
[781] David M. Paciocco & Lee Stuesser, *supra* note 698, at 404.
[782] R. v. Corbett, [1988] 1 S.C.R. 670, 64 C.R. (3d) 15 (S.C.C.).
[783] R. v. Handy (J.), [2002] S.C.C. 56; Mike Redmayne, *Similar Facts, Familiar Obfuscation*, 6 Intl. J. Evid. Proof 243 (2002).
[784] Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, *supra* note 772 *but cf.* Mike Redmayne, *The Relevance of Bad Character*, *supra* note 772.

who seeks to testify and has a reasonable defense in a serious frauds case but has an unsavory background might also find a bench trial attractive.

VI. The Right of Silence, The Privilege Against Self Incrimination, Confession Evidence, and Inferences

> "The privilege against self-incrimination is a venerable common law institution whose roots stretch back at least as far as the seventeenth century".[785]

It was the longstanding holding of the English common law that a party had a right to silence free from inferences to be drawn from that silence.[786]

The right of silence was adroitly summarized as including the following:

1. A suspect is under no legal obligation to assist the police with their inquiries;
2. An accused is not obliged to give advance notice of his defense;
3. Having been cautioned by the police, it is wrong to make adverse comments about the accused's silence, declination to answer questions, or failure to reveal a defense;
4. An accused cannot be compelled to testify by the prosecutor;
5. If the accused does not testify, that fact is not subject to comment by the prosecution;
6. If the judge comments on the accused's failure to testify so that a jury may draw inferences, the judge must also charge the jury that they must not assume the defendant's guilt from such a failure.[787]

---

[785] Paul Roberts & Adrean Zuckerman, Criminal Evidence, 392 (Oxford 2004).
[786] Smith v. Director of Serious Fraud Office, [1992] 3 All ER 456, 3 WLR 66. Likewise the common law holds that citizens have no duty to cooperate with a police investigation. Rice v. Connolly, [1966] 2 All E.R. 649, 2 Q.B. 414.

The parameters or the dimensions of the right to silence have been the subject of great debate in all of the comparator nations, but England and Wales, has arguably seen the traditional boundaries modified if not narrowed. Despite a clear majority of the Roskill Royal Commission concluding that a negative inference should not be drawn from silence during a police station interrogation, Parliament modified the common law and rejected the Royal Commission's recommendations, eroding these rights in the form of Section 34-37 of the Criminal Justice and Public Order Act 1994 as well as Section 2 of the Criminal Justice Act 1987. One leading commentator opined that "it was pragmatic arguments pushed forward by the alliance of the police and the Home Secretary, that led to the extraordinary spectacle of the Government rejecting one of the Royal Commission's most carefully reasoned recommendations", that being its call to retain the right to silence in its present form.[788] These changes have made major inroads into English protections against self-incrimination, with little succor being offered by the European Court of Human Rights. The European Court held that a conviction solely based on inferences drawn from silence is incompatible with the right to silence, by

---

[787] Adrian Keane, The Modern Law of Evidence 432-433 (6th ed., Oxford University Press 2006). The above referenced points are substantially from Keane although somewhat reorganized and expanded upon so that quotation marks are problematic. Keane asserts that rule 24 of the Criminal Procedure Rules 2005 which requires the defendant to give "the prosecution a written statement of the finding or opinion which he proposes to adduce" is a further curtailment of the right to silence, but fails to fully explain why.

[788] Andrew Ashworth, The Criminal Process: An Evaluative Study 100-101 (2nd ed., Oxford University Press 1998); *see* Andrew Ashworth & Michael Redmayne, The Criminal Process 95-99 (3rd ed., Oxford University Press 2005) for a discussion of the practical effects of that legislation.

implication also finding such inferences to be consistent with the Convention of Human Rights, if accompanied by other proof and a proper direction to the jury by the judge.[789]

Section 2 Criminal Justice Act 1987 has specifically eroded the right of silence in England and Wales in the investigation of Serious Frauds requiring that a citizen must cooperate with a serious frauds investigation or face prosecution for "failure to cooperate".[790] There are certain advantages for the cooperating citizen because although it compels a party questioned in a serious frauds investigation to answer questions, it also provides that the answers given cannot be used against that party in court unless they later change their story. By contrast, the defendant may not be called as a witness in the prosecution's case but in serious frauds investigations a putative defendant is compelled under a cloak of protection to provide potentially useful information to what would be a case against them.[791]

The legislative alteration of the dynamic of silence in England and Wales may make a bench trial an attractive alternative for a defendant with an inconsistent story, or who has opted not to cooperate with an investigation. The defendant may be better able to explain to a judge the divergence in his/her statements from the time of the investigation to the actual trial, or to explain that silence during the investigation was selected on the advice of counsel with less damage to the defendant's case before a judge than before a jury. Moreover, the application of the rule has great potential for confusing a jury. The

---

[789] Condron v. United Kingdom, [2000] Eur. Ct. H.R. 35718/97, (2000) 31 EHRR 1; Beckles v. United Kingdom, [2002] Eur. Ct. H.R. 44652/98, (2002) 36 EHRR 13.
[790] Criminal Justice Act, 1987, c. 38, § 2.
[791] Youth Justice and Criminal Evidence Act, 1999, c. 23, § 53 (4).

apparent change of story may be far more nuanced than the prosecution would be prepared to acknowledge, but a judge may be better suited to evaluate the significance of the change of position. A judge as the trier of fact would be far more tolerant than a jury of a failure to respond to police inquiries based on a solicitors' advice, though Section 34 of the Criminal Justice and Public Order Act, 1994 allows either a jury or magistrate to draw inferences from an accused's failure to disclose any fact which he/she relies upon in the subsequent defense of the case when questioned under a caution if the fact or facts were reasonably to be expected to be mentioned. Likewise, Section 35 of the Criminal Justice and Public Order Act allows a jury or magistrate to "draw such inference as appears proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question."

While counsel may explain the failure, the jury may properly conclude there is no answer that "would stand up in cross examination and may draw an adverse inference."[792] Notwithstanding the Law Society's guidance in the 1990s that a suspect should respond to questioning on a solicitor's advice only when sufficient information was given prior to interrogation about the case, the Court of Appeal did not find that to be a basis for the trial court to decline to instruct negatively regarding the inference, but did concede that the jury or magistrate could be told the circumstances surrounding the exercise of the

[792] R. v. Cowan, [1996] Q.B. 373, 381, [1995] 4 All E.R. 939, [1996] 1 Cr. App. Rep. 1; *see also*, Ashworth, The Criminal Process: An Evaluative Study (2d Ed. Oxford U. Press 1998), at 101; Ashworth & Redmayne, The Criminal Process (3d Ed. Oxford U. Press 2005) at 94-99.

right of silence.[793] Again a trial by judge may diminish the damage associated with these provisions.

Section 36 of the Criminal Justice and Public Order Act 1994 allows adverse inferences to be drawn for unexplained body marks on the suspect's body or for evidence in his possession or in his proximity when arrested. Section 37 of that act allows an adverse inference to be drawn for a failure by the defendant to explain his presence at a place at or about when the crime was committed. Both statutes assume a proper police warning prior to questioning.

The Criminal Procedure Rules issued by the Secretary of State for Constitutional Affairs articulate an over-riding objective to which all participants and the Courts are subject. It asserts respect for the presumption of innocence, the right to silence, and attorney-client confidentiality. It does however require the defendant to indicate in advance what is disputed.[794]

---

[793] R. v. Howell, [2003] Crim. L.R. 405; R. v. Knight, [2004] Crim. L.R. 449; R. v. Argent, (1997) 2 Cr. App. Rep. 27; R. v. Roble, [1997] Crim. L.R. 449; Ashworth & Redmayne, *supra* note 854, at 96-99.

[794] Department for Constitutional Affairs, *The Objectives and Content of the First Criminal Procedure Rules*, 3/22/05, Part I, *available at* http://www.justice.gov.uk/criminal/procrules_fin/index.htm (Oct. 4, 2007). "Part 1 of the new Rules contains the overriding objective to which all participants and the courts themselves are subject. It is this objective that is at the heart of the culture change that the Rules promote. The presumption of innocence and a robust adversarial process are essential features of English legal tradition and of the defendant's right to a fair trial. The overriding objective acknowledges those rights. It must not be read as detracting from a defendant's right to silence or from the confidentiality properly attaching to what passes between a lawyer and his client. Such rights in any event are guaranteed by the Human Rights Act 1998 to which the Criminal Procedure Rules, like other legislation, are subject. But it is no part of a fair trial that questions of guilt and innocence should be determined by procedural maneuvers. On the contrary, fairness is best served when the issues between the parties are identified as early and as clearly as possible. Lord Justice Auld made this point in his Review. The right to silence does not justify a refusal to

The rules demonstrate an intent to narrowly protect the right to silence and to require the defendant to disclose much more pretrial about their defense than has traditionally been required.

While the precise dynamic of these new rules is difficult to measure, they certainly will provide juries with more expansive credibility issues to weigh. A valuable resource to assist in evaluating the task of the jury with regard to the diminishing of the right of silence and problems posed by the changes in the law is the judges' summing up to the jury. The following was charged to the jury in a serious fraud case where the defendant's police interview was part of the proof. One co-defendant, Archer Smith, ultimately testified against her superior Woodhead, who was accused of managing the company that committed the fraud. The following is the charge or summing up given by the judge to the jury regarding Woodhead's interview:

> • When interviewed on 26 July 2001 he made "no comment" to the questions put to him. That was his right.

---

provide the court with such information as is necessary for the effective management of the case and: "To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified . . ., I can understand why, as a matter of tactics, a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of these principles. The Committee, too, was not persuaded that it is just for a party to obstruct or delay the preparation of a case for trial in order to secure some perceived procedural advantage, or to take unfair advantage of a mistake by someone else. If courts allow that to happen it damages public confidence in criminal justice. The new rules make it clear that courts must not allow it to happen."

His failure/refusal to answer questions does not and cannot provide any support for the prosecution case.

- He answered questions when interviewed on the 29th April 2002 – H3 25 to 34. (Jury Bundle 4.) The subject matter was primarily the Midland No.2 Account, the cheques to cash drawn upon it and the suggestion that the cash was handed to Mr. Woodhead by Melanie Archer-Smith.
- You know from the content of the interview that he firmly denied the allegations.
- Likewise, he was asked about the "Cargo" cheque stubs and "Cargo" invoices referred to by Roy Kelk. He denied being responsible for the writing on the cheque stubs or for providing the invoices.
- He made some admission, principally that he was in control of Midland Coating Company Ltd for a short period viz till December 1999 or March 1998.
- You are entitled to, and should, look at the whole of the interview in deciding where the truth lies. Bear in mind, however, that his replies were not on oath, not made before you and have not been tested before you.

9. LIES

- The Crown submits that the answers in interview contain a proved lie.
- The alleged lie is the Defendant's assertion that he was not in control throughout the businesses of Midland Coating Company and Seal Point.
- It is for you to say on all the evidence whether you are or are not sure that that was a deliberate lie. If not, concern yourselves no further. If you are, and if you are sure that the lie relates to a material issue, ask yourselves why the lie was told.
- If you are sure that the Defendant lied because he knew the truth would help convict him of the offence, you would be entitled to regard that as support for the prosecution case.
- On the other hand, if you thought there was or may be some innocent explanation for the lie (though none has been advanced) you would not so regard it.

The jury must engage the weighing of an interview that is inconsistent with the defendant's posture in court in this case. Given Woodhead's refusal to answer in the initial interview, it is reasonable to assume that on advice of counsel he then submitted to an interview on 29 April, 2002 to avoid the negative inference of non-responsiveness. Instead he is confronted with the inconsistency of that statement as compared to the proof at trial.

The charge or summing up given with regard to his co-defendant not only creates a further comparison and contrast for the jury that would not have been present under the prior law, but this situation poses an even greater problem because the codefendant Archer-Smith testified against Woodhead.

The charge or summing up on that issue was as follows:

> •These are to be looked at only when considering her case. They have no relevance to your consideration of Christopher Woodhead's case.
> •The Defence make two points in relation to the interviews (i) that the Defendant was prepared throughout to provide detailed answer to police questioning;
> (ii) that the answers she gave are consistent with her evidence at trial.
> •You are entitled to take both those points into account in assessing the Defendant's truthfulness.
>
> THE DEFENDANT ARCHER-SMITH'S EVIDENCE
> •The Defendant's evidence is entitled to the same fair consideration as evidence from any other witness.
> •Bear in mind that the businesses under scrutiny terminated in September 1999. The Defendant herself answered police questions fully and is not responsible for the length of time between September 1999 and trial. Make appropriate allowances for the fact that the Defendant is giving evidence about events that took place a

considerable time ago and that there is bound to be scope for genuine forgetfulness and confusion.
•Evidence given from the witness box is given in the case as a whole.
•You are, therefore, entitled to consider Archer-Smith's evidence as part of the case against Christopher Woodhead particularly on the question of who had the money. One note of caution: A Defendant may have a motive (eg self-preservation) when giving evidence to the disadvantage of a co-Defendant. This is not to disparage her evidence. It is to alert you be aware of and to consider the possible motive referred to.

The co-defendant Archer Smith was consistent in both interview and in court. Woodhead was not. This factor is entirely beyond the traditional weighing of testimony because the right of silence would have afforded Woodhead not only protection from inconsistency, it also would have protected him from contrasting that failure with the consistent testimony of his co-defendant. Woodhead was convicted, Archer-Smith was acquitted.[795]

Consider the summing up to the jury in another case where the defendant, Ajvinder Singh gave two interviews and then remained silent in the third interview because of his solicitor's advice:[796]

10. Each Defendant was, after arrest, interviewed by the police. The Defendants Gemma Eggleton and Manjit elected to answer the questions. Ajvinder Singh answered all questions in his first two interviews.
10.1 The interviews of any Defendant are to be looked at and considered only when dealing with the case of <u>that</u> Defendant. The replies he gives can be relied on by him as evidence in his case.

[795] R. v. Melanie Archer-Smith and Christopher Woodhead, unreported, the summing up provided to the author by his Honor Shaun Spencer.
[796] R. v. Ajvinder Singh, unreported, the summing up provided to the author by His Honor Shaun Spencer.

10.2 The Defendant Ajvinder Singh elected to remain silent in his third interview. That was his right. He had been cautioned at the start of the interview. He had been told that he did not have to say anything.
10.3. The Defendant Ajvinder Singh was also told, as part of the caution that it may harm his defence if he did not mention when questioned something later relied on in court.
10.4 As part of his defence in court Ajvinder Singh has told you that the Uppal cheque related to the intended purchase by a man calling himself Uppal of a consignment of soft drinks to be imported from Spain; further, that the 3 page fax produced by him in his evidence was a genuine document which came into being at the time of the transaction.
10.5 None of the above facts now relied on by the Defendant Ajvinder Singh were mentioned by him in interview. "Why not?" says the prosecution, "if that really is a truthful explanation".
10.6 The law is that in certain circumstances, failure to mention facts may count against a Defendant. This is because you could draw the conclusion that the reason for the failure by the Defendant to mention the soft drinks transaction and the fax was because it is a false explanation and the fax is a concoction; further that the reason for relying on a false explanation and/or a concoction is because he is guilty of the conspiracy to defraud alleged in count 1.
10.7 You may draw such a conclusion against Ajvinder Singh only if you think it is the only fair and proper conclusion to draw and you are satisfied about the following:

- that Ajvinder Singh could reasonably have been expected to mention in interview the facts he now relies on
- that apart from his failure to mention the facts, the prosecution evidence is so strong that it clearly calls for an answer from him.

10.8 If you draw such an adverse conclusion against Ajvinder Singh you may use it as additional support for the remainder of the prosecution case. It would not be right to convict wholly or even mainly on the strength of such an adverse conclusion.
10.9 Ajvinder Singh says that you should not draw such a conclusion against him. He says that he has answered all questions in the previous interviews. He has not been believed; why else would the police have frozen his assets?

> He saw no point in giving an account which, on past history, would not be accepted.
> 10.10 He also says that he had received advice from his solicitor to remain silent. The prosecution do not accept that he was given such advice. The Defence have not called the solicitor to give evidence on the question.
> 10.11 If you accept that he was or may have been so advised that is obviously an important consideration. It does not, however, automatically prevent you from drawing any conclusion from his silence. A person given legal advice has the choice whether to accept it and act on it or reject it and give his account (if he has one). The caution incorporated a warning that any failure to mention facts relied on at his trial might harm his defence.
> 10.12 Having considered the above matters decide whether Ajvinder Singh could reasonably have been expected to mention in interview the facts he now relies on.
> 10.13 If you consider that he had, or may have had, an answer to give but that the genuinely and reasonably relied on the legal advice to remain silent, you should not hold his silence against him. If you were sure that he remained silent not because of his legal advice, but because he had then no answer, or no satisfactory answer to give and merely latched on to the advice as a convenient shield behind which to hide, you would be entitled to draw an adverse conclusion.

Again there is the interplay during the trial created by the statute, that would not otherwise exist, which questions the defendant's truthfulness, i.e.: is there an inconsistency in the statements and is the silence in the third interview based on a solicitor's advice with the consequent negative inferences to be drawn by the jury? This portion of the charge given in this case, created by Criminal Justice Act 2003, establishes an entirely new discussion about the truthfulness of the defendant that the right of silence as previously constituted would protect.

American courts in the early 1990s moved in the opposite direction from those in England and Wales, holding that once warned against self-incrimination, the suspect's silence was "insolubly ambiguous," thus once warned the silence of the defendant post warning would not bear adverse consequence or a penalty. [797] [798] However, while the Fifth Amendment to the U.S. Constitution was the basis of the defendant's right to not be a witness against oneself, that right is limited to "testimony" and "communication" thus lineups extraction of hair, blood and DNA are constitutionally permissible.[799]

Because juries would likely have less legal sophistication, they may not have a judge's ability to sort through the distinction between the protection of the right to silence, the heeding of counsel's advice during an investigation, and the making of an admission. While it is difficult to determine the specific course in England and Wales, the higher rate

---

[797] Charles H. Whitebread, & Christopher Slobogin, Criminal Procedure (3rd ed., Foundation Press, Inc. 1993).

[798] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 662 (1966). Holding that the defendant, or putative defendant once a target had a right to be advised of his/her right to silence. Miranda provoked a sea change in American policing and its application and interrelationship with the Fifth Amendment to the U.S. Constitution. Miranda and its progeny clarify a four component protection against State compulsion: 1) compulsion; 2) incrimination, 3) testimonial evidence – evidence that communicates something beyond the physical characteristics of a person, his/her identity, or appearance, 4) personalized compulsion – a person compelled to testify against another. *See also,* Charles H. Whitebread, Christopher Slobogin, Criminal Procedure 3d Ed., *supra* note 797.

[799] Holt v. U.S., 218 U.S. 245, 31 S. Ct. 2 (1910). Justice Holmes states "the prohibition of compelling a man in criminal Court to be a witness against himself is a prohibition of the use of physical and moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material"; Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966) (must submit to extraction of blood); U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967) (participate in a line up); Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967); U.S. v. Mara, 410 U.S. 19, 93 S. Ct. 774 (1973) (produce a handwriting exemplar); U.S. v. Dionisio, 410 U.S. 1, 93 S. Ct. 764 (1973) (produce a voice exemplar).

of convictions (86%) in frauds cases some say suggests that juries may have difficulty making these distinctions.[800]

Therefore it is not unreasonable to assume that the inferences associated with the 1994 Act should enhance the conviction rate in England and Wales. Moreover, the inferences contained in Sections 34, 35, and 37 of the Criminal Justice Act 2003 would likely be found to be unconstitutional if enacted in America as violating the Fifth Amendment to the U.S. Constitution. Because of the Fourteenth Amendment, the jurisprudence of the U.S. Supreme Court in this area is applicable to California and New York.[801]

The Canadian approach is comparable to the American rule and holds that: "Adverse inferences cannot generally be drawn against an accused person because of his pretrial silence".[802]

Section 7 and Section 24(2) of the Canadian Charter exclude statements that violate the right to silence, the most common being deprivation of counsel.[803] The Canadian

---

[800] 651 Parl. Deb., H.L. (5th ser.) (2003) 781-782, The Remarks of Baroness Kennedy of the Shaws as quoted in Research Paper 06/57, House of Commons Library, The Frauds (Trials Without a Jury) Bill 2006-07; The Former Master of the Rolls, Lord Donaldson of Lymington speculates that fraud cases were beyond the jury's capacity. "It is said that juries are wholly suitable for such trials because the conviction rate is 86 percent. That figure frightens me. It is so out of line with the rule of conviction for non-fraud cases that I wonder whether the serious fraud squad is right in claiming. I do not doubt that it does – that it picks all the winners, and whether the jury simply does not understand and comes to the conclusion in some cases that people would not have been charged if they had not been guilty".

[801] U.S. Const. Amend. XIV makes applicable to the States key constitutional protections, including the Fifth Amendment protection against self-incrimination.

[802] David M. Paciocco & Lee Stuesser, The Law Evidence (Irwin Law 2005) at 284.

[803] *Id.* at 286.

Supreme Court has held, for example, that the right to silence has been violated by asking the accused during cross examination why he had not given the same explanation to the police,[804] or why a defendant accused with the crime of having fled the scene of an accident did not tell the police he was fleeing a robbery, the excuse given at trial,[805] or that alibi evidence need not be given until counsel consulted and proper notice given.[806] However, the door can be opened[807] and a co-defendant may cross examine an accused about pre-trial silence.[808]

Canadian Courts have excluded other evidence obtained from a confession which was deemed illegally obtained.[809] Evidence of this type has included high profile murder investigations where the confession has been procured inappropriately including the denial of the right to counsel.[810] Some leading Canadian evidentiary commentators like David Paciocco are critical of the exclusion of physical evidence that might be obtained as the fruit of the illegally obtained confession based on the Supreme Court's interpretation of 24(21) of the Criminal Code.[811] In England and Wales, the police and the Criminal Justice Act §76(4) allows the admission of evidence obtained from a confession wholly or partially excluded.

---

[804] *Id.*, *citing* R. v. Chambers, [1990] 2 S.C.R. 1293.
[805] *Id.*, *citing* R. v. Cones, [2000] 143 C.C.C. (3d) 355 (Ont. C.A.).
[806] R. v. Cleghorn, [1995] 3 S.C.R. 175.
[807] R. v. W (M.C.), [2002] 165 C.C.C. (3d) 129, 3 C.R.(6th) 64, ¶ 78 (B.C.C.A.).
[808] R. v. Crawford, [1995] 1 S.C.R. 858, 37 C.R. (4th) 197 (S.C.C) (Sub. Nom. R. v. Creighton); *see also* David M. Paciocco & Lee Stuesser, *supra* note 699, at 289 n.117.
[809] Constitution Act, 1867, Part I, ch. 11 (U.K.), as reprinted in R.S.C. ch 11, schedule B (1982).
[810] R. v. Feeney, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609; R. v. Burlingham, [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7.
[811] R. v. Feeney, *supra* note 810; and R. v. Burlingham, *supra* note 810 are the main objects of Paciocco's criticism in David M. Paciocco, Getting Away With Murder: The Canadian Criminal Justice System ch. 6 (Toronto: Irwin Hall 1999); For a critical review see Don Stuart, *A Review of David M. Paciocco, Getting Away With Murder: The Canadian Criminal Justice System*, 44 McGill L. J. 1049 (1999).

The practical problem associated with the narrowing of the right to silence is that juries are being asked to draw inferences but will be instructed by the judge to make those inferences only when they find that the prosecutions case has been proved to the extent that an answer by the defendant is required.[812]

John Jackson views the implications of the increased judicial role in assessing evidence based on inferences to be drawn from the silence of the defendant to see if "there is enough strength to find a conviction" and to guide juries on the risks of over-reliance on this type of evidence:

> "As judges are coming to admit more readily evidence which carries a risk of being treated in a prejudicial way by a jury, this is a timely warning but there is no guarantee, of course, that a jury will heed a judge's direction. A better guarantee of fairness may be to allow defendants to opt for trial by a judge where they consider that evidence may not be assessed fairly by a jury, as is the practice in a number of common wealth jurisdictions. Defendants given a choice of mode of trial could not thereafter complain that they had been compelled to submit to an unreasoned judgment of their peers."[813]

It must be particularly chilling for a defendant in a document intensive serious fraud cases to be compelled to cooperate, find that there are facts that he/she has forgotten and, therefore, not disclosed and confront a finding that he/she failed to comply with the requirement of the Criminal Justice Act 1987, §7, 9 and 10, of cooperation with the investigation and therefore:

---

[812] R. v. Birchall, [1999] Crim. L. R. 311, 313.

[813] John D. Jackson, The Impact of Human Rights on Judicial Decision Making, *in*, Sean Doran & John D. Jackson, The Judicial Role In Criminal Proceedings 118-119 (Sean Doran & John D. Jackson eds., Oxford: Hart 2000).

> "...the judge or, with the leave of the judge, any other party may make such comment as appears to the judge to be appropriate, and the jury, or in the case of a trial without a jury, the judge, may draw such inferences as appear proper."[814]

Whether the right to choose trial by judge, as Jackson suggests, is a sufficient safeguard to protect against inferences that may be both unfairly drawn and devastating to the defense of the case is an open question. Decisions by the European Court of Human Rights suggest that inferences drawn from silence do not violate the rights of the defendant so long as there is independent evidence of sufficient weight to allow conviction.[815] One is compelled to ask if such prejudicial inferences cannot stand alone, how can their impact on a jury, which does not ultimately present a reasoned judgment, be evaluated? And particularly in a complex documents case, should inferences be drawn from variations of an explanation given to the police at the commencement of investigation, when recollections will likely be refreshed by later disclosed documents? Aren't these inferences encroachments upon the defendant's right to be fully confronted with the charges and the evidence, to gauge whether there is sufficient evidence for the State to meet its burden and to then determine if silence is an indicated defense? Doesn't the creation of said inferences in fact a diminish the prosecution's burden of proof because as long as there is some evidence, if the defendant fails to respond in a serious fraud case or is inaccurate in response so that negative inferences can be drawn, that failure may be the ultimate persuading fact to a jury of the defendant's guilt? In some

[814] Adrian Keane, *supra* note 674, at 435.
[815] Schenk v. Switzerland, [1988] Eur. Ct. H.R. 10862/84, (1991) 13 EHRR 242; Doorson v. Netherlands, [1996] Eur. Ct. H.R. 20524/92, (1996) 22 EHRR 330.

ways this also alters the judge's role even more from the description of Mirjan Damaška that:

> "The judge stands at the gate of the fact-finding citadel, charted with determining whether information to be passed on to the ultimate fact finder possesses a sufficient cognitive potential to be admissible. But the trustworthiness of the information's carrier is not his business: that lies in the exclusive province of the revered jury."[816]

Does a judge in a weak case that has some evidence in support of the prosecution's claim put the inferences to the jury knowing full well of the potential prejudice? Thus the calculation may well be that the other proof standing alone may not convict and the inferences alone cannot be used to convince, but cobbled together they may well meet the European Court of Human Rights standard. Will a judge alone trying the case be less inclined to rely upon the inferences than a jury? Of course given the restrictions on jury research in England and Wales it will be impossible to evaluate, but clearly the erosion of the right to silence has created new and perplexing problems for the defendant that a choice of the mode of trial might mitigate by being able to select trial by judge in the hope that judge by virtue of legal sophistication would be better able to understand the defendant's dilemma.

VII. Pretrial Exclusionary Proceedings – Jury As Compared to Non-Jury Cases

All of the comparator jurisdictions agree that in a jury trial, it is important for the trial judge is to vet the prejudicial or inadmissible evidence outside of the jury's presence. Moreover, the prejudice potentially caused to a jury by the exposure to such information

[816] Mirjan Damaška , Evidence Law Adrift (New Haven: Yale University Press 1997).

is not regarded as prejudicial if presented to the judge for a ruling in a bench trial based both on the belief that the judge's training will allow him/her to set the information aside in decision making, and in part because the jury is the ultimate trier of fact.[817] Wasik citing Doran and Jackson muses . . . "why should we be so sanguine in assuming that those who are trained in the law are exempt from this kind of prejudice,"[818] referencing by contrast the statutory prohibition that an England and Wales magistrate who determines a defendants bail application and thus learned of the Defendant's prior criminal record may not then try the defendant.[819] On other issues that arise regarding bias or prejudice for magistrates or jurors, Wasik asserts that the Gough case holds that the test for both is the real danger of bias being used.[820] Finally Wasik identifies voir dire before magistrates on the admissibility of character evidence, confessions, and prior misconduct as potentially prejudicing factors of these lay triers of law and fact, recommending that these matters be heard and decided in open court before the Magistrate's clerk alone to achieve prophylaxis against potential bias.[821]

By contrast, the transformation of the legally trained judge into the trier of fact in bench trials has not historically been accompanied by an increased effort to protect that judge from prejudicial information. Doran and Jackson note that Diplock trial judges adamantly deny any relationship between knowledge of prejudicial inadmissible facts, and a suppressed confession or a suppressed prior criminal record and conviction, asserting that

---

[817] In Canada—David M. Paciocco & Lee Steusser, *supra* note 698, at 14; In the USA – Kenneth Culp Davis, *Hearsay in Non-Jury Cases*, 83 Harv. L. Rev. 1362, 1368 (1970); In England and Wales – Paul Roberts & Adrean Zuckerman, Criminal Evidence 450-451 (Oxford 2004).
[818] Martin Wasik, *Magistrates: Knowledge of Previous Convictions*, [1996] Crim. L. R. 851.
[819] Magistrates' Courts Act, 1980, c. 43, § 42 (1); Bail Act, 1976, c. 63, sch. 1 (Eng.).
[820] Martin Wasik, *Id.*, at n.20; *R v. Gough*, [1993] AC 646, 2 WLR 883, 2 All E.R. 724, 737.
[821] Martin Wasik, *Id.*, at 861-862.

said knowledge can be set aside when reaching a verdict. There are potential problems posed by judicial knowledge of a prior criminal record:

> "One judge thought that the ultimate proof of this was that even though most Diplock defendants have records, many are still acquitted:
>
> > 'One can say that in 95% of cases where the defendant has a previous record for a reasonably similar case, the Defendant is guilty but knowledge of that is not enough to convict.'"[822]

Greer and White maintain that declining acquittal rates in Diplock trials were suggestive of case hardening of the judges trying the cases.[823]

The outcome certainly is different when jurors have knowledge of prior convictions. The London School of Economics Jury Project concluded that admission into evidence of previous similar convictions increased the chance of verdict of conviction by jurors.[824] There is a similar finding in Canada after a comparable study.[825] A comparable study does not seem to exist evaluating bench trial outcomes for legally trained judges in any of the comparator jurisdictions. A weighing of the Diplock bench trial outcomes and the demonstration of detrimental impact of prior convictions upon trial jurors suggests, that

---

[822] John Jackson & Sean Doran, Judge Without Jury: Diplock Trials in The Adversary System 244 (Oxford: Oxford University Press 1995).
[823] S.C. Greer & A. White, Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offenses in Northern Ireland 22-23 (London: Cabden Trust 1986.
[824] The LSE Jury Project, *Juries and the Rules of Evidence* [1973] Crim. L. R. 208-23.
[825] A.N. Doob & H.M. Kirschenbaum, *Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act Upon an Accused*; 15 Crim. L. Q. 88, 88-96 (1972). *See also*, Valerie P. Hans & A.N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L. Q. 235, 235-53 (1975).

the choice of bench trial as the mode of trial in serious frauds cases could be beneficial to the defendant, based upon the identity of the trial judge.

In none of the comparator jurisdictions are there statutes or guidelines which require judicial recusal in the event of prejudicial information coming to the attention of the judicial trier of fact. The issue of recusal is left to the individual judge's discretion. As we will see later in this chapter, trained trial judges are seen by Appellate Courts as able to distinguish between the admissible and the inadmissible, and are presumed to be able to lay prejudice aside. The survey of New York State judges reported in Chapter 8 establishes that there is real exposure to such potential prejudicial circumstances, a conclusion that is also reached as a result of interviews with England and Wales judges in Chapter 9.

VIII. Questioning and Trial Participation by Judge and Jury

A. Judicial Questioning During Trial

In 1978 at least one observer noted that the American trial judge "is emerging as a more active participant at trial, rather than a neutral observer",[826] maintaining that judges should not question witnesses in either jury or non-jury trials except for "a few carefully monitored questions by jurors".[827] Some observers argue that a common law judge

[826] Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 Va. L. Rev. 1 (1978).

[827] *Id.* at 63. Saltzburg argues that judge's may overcome problems with passivity which an lead to injustice by suggesting lines of questioning to counsel, presumably off the record or out of the presence of the jury, or declare a mistrial where a lawyer is unprepared or unqualified". *Id.* at 62.

morphs into a civil law judge in non-jury trials, becoming an intervening questioner who can and with some frequency does modify the tone and substance of the trial.[828]

Lord Bingham of Cornhill explained the distinction with clarity:

> "The common law judge, it is often said, unlike his counterpart in a civil law system ... is not concerned with establishing the truth of what did or did not happen on a given occasion in the past, but merely with deciding, as between adversaries, whether or not the party upon whom the burden of proof lies has discharged it to the required degree of probability."[829]

In Air Canada v. Secretary of State for Trade, the Court of Appeal refined the judicial role:

> "The due administration of justice does not always depend on eliciting the truth. It often depends on the burden of proof."[830]

Lord Bingham further acknowledges however that the Court of Appeal in Jones v. National Coal Board defined the objective of the English judge as being:

> "Above all . . . to find out the truth, and to do justice according to the law . . . at the end to make up his mind where the truth lies!"[831]

---

[828] Sean Doran, John D. Jackson, & Michael L. Siegel, *Rethinking Adversariness in Non-Jury Criminal Trials*, 23 Am. J. Crim. L. 1, 18-22 (1999). The authors note problems associated with such a morphing such as the rules for burden of proof are very different in the inquisitorial model, there is little oral evidence in that model and the Judges do not "come cold to evidence. They are expected to read and digest the dossier and are permitted to base their findings on it." Finally the inquisitorial model judge has much more control over what proof is actually placed in evidence.

[829] Lord Bingham of Cornhill, The Business of Judging 4 (Oxford: Oxford University Press 2000).

[830] Air Canada v. Secretary of State for Trade, (1983) 2 A.C. 394, 411, 1 All E.R. 910.

This appears to be an exhortation for judicial activism during trials particularly during bench trials where the judge as the trier of fact is engaging in analysis of testimony as the case is presented. English judges and American judges acknowledge a much more active role during bench trials than during jury trials. However, it does not appear that such activism is a major factor in attorney/client mode of trial choices as demonstrated by the survey conducted of New York judges and lawyers. Obviously caution should be exercised by the trial judge, whether with a jury or judge alone, to maintain neutrality and passivity.

(Then) Denning J argued for minimal judicial intervention stating:

> "In the system of trial which we have evolved in this country, the Judge sits to hear and determine issues raised by the parties, not to conduct an investigation or examination on behalf of society at large . . .
>
> Let the advocates one after the other put the weights into the scales . . . but the judge at the end decides which way the balance tilts."[832]

While referencing civil trials, Lord Denning notes a principle applicable to both civil and criminal trials:

> "The judge's part in all of this is to hearken to the evidence, only himself asking questions of the witnesses when it is necessary to clear up any point overlooked or left obscure. . . ."[833]

---

[831] Jones v. National Coal Board, [1959] 2 Q.B. 55, 63-64 per Lord Denning citing Lord Patrick Devlin, *The Judge*, 43 Mod. L. Rev. 595 (1980).
[832] *Id.* at 63.
[833] *Id.* at 64.

While all of the foregoing contemplated the jury trial, why should the role of the judge be any different in a bench trial? Can and should a judge, in pursuit of the truth, in the common law adversarial system, take over the bench trial, or at least the questioning of key witnesses in a solo effort to obtain the truth and to do justice? Certainly the Diplock experience and the "slow plea" bench trials indicate that judges in those cases engage in this conduct with some frequency. However, the outcomes of such trials are not uniformly pro prosecution.[834] Doran, Jackson and Siegel maintain that the judge should not exceed the bounds of questioning imposed upon jurors. Avoidance of altering the adversarial balance is nuanced in concept and potentially difficult to achieve in practice in bench trials. Doran, et al acknowledge that there is an adverse consequence to judicial reservation of questions to witnesses which is also problematic for the advocates and their clients:

> "Excessive pussiacty is equally debilitating (to excessive intervention) to the fact finding process in bench trials. A single fact finder is likely to begin to form an opinion of the case before all of the evidence is in. If this view is not communicated to the parties in any fashion, the loser may be denied the opportunity to present a case most likely to persuade the closing mind. The jury provides a natural protection against this problem because it cannot, as a unit, have an opinion of the case prior to deliberations". (Matter in parenthesis added)."[835]

In a very recent case the Court of Appeal, Civil Division ordered a retrial where the judge "arrogated himself to a quasi-inquisitorial role which ... is entirely at odds with the

---

[834] *See* John Jackson & Sean Doran, *Miscarriages of Justice: The Role of the Court Appeal in Northern Ireland, Standing Advisory Commission on Human Rights*, Seventeenth Report, at 224-225. A small sample showed Diplock Trials had a higher acquittal rate than jury trial; Stephen J. Schulhofer, *supra* note 545, at 1087, "There is a 20% acquittal rate for "slow pleas".

[835] Jackson, Doran, & Siegel, *supra* note 672, at 29.

adversarial system".[836] The Appellate Court graphically describes and condemns judicial interruption during the trial for questioning in an adversarial mode punctuated by judicial rudeness.[837]

In Re (R) Litigant in Person: Judicial Intervention, the Court was critical of judicial interventions, characterizing a judge's relationship with witnesses as "the judge must be a shepherd and not a wolf".[838] Moreover, the extreme circumstance of the Court directing a guilty verdict was decried in R. v. Wang,[839] suggesting rather that finding insufficient evidence and thus directing a verdict of not guilty is a far more acceptable judicial posture.

Therefore the ultimate test of excessive judicial intervention in England and Wales appears to be adversariness:

> "...the presence of the jury in the criminal trial makes judicial restraint all the more necessary. The interventionist trial judge runs many risks: of revealing his own view of the facts to the jury, who may accord that view undue weight; of making counsel appear less able both in the eyes of the jury and in the eyes of the defendant; of giving the defendant the impression that the judge is "against him"; and ultimately of engendering in the defendant (and possibly the general public) a loss of faith in the trial system as a whole".[840]

---

[836] Southwark London Borough Council v. Kofi-Adu, [2006] EWCA Civ. 281, ¶148. Judicial bias was defined in R. v. Gough, [1993] AC 646, 2 WLR 883, 2 All E.R. 724, 737: as "The Court should ask itself whether having regard to those circumstances there was a real danger of bias .. in the sense that he (the Court) might have unfairly regard (or have unfairly regarded) with favor, or disfavor the case of the party to the issue under consideration by him".
[837] Southwark London Borough Counsel v. Kofi–Adu *supra* note 836, at ¶148.
[838] Rayner v. Davies, [2002] E.W.C.A. Civ. 1880.
[839] R. v. Wang, (2005) 2 Cr. App. Rep. 8, 169 J.P. 224, (2005) Crim. L. R. 645.
[840] Sean Doran, *Descent to Averness*, 139 New L.J. 1147 (1989) (citing a number of judicial interventions in which the trial judge primarily vigorously questioned in a cross-examination

Offering an extreme, the American Federal Rules of Evidence authorize a United States District Court judge on his/her own motion or upon the suggestion of the parties, to call witnesses and to interrogate witnesses -- a right that exists in both judge and jury trials and provide that the court may upon notice and recommendation from the parties appoint experts in civil and criminal cases. This power does not preclude the parties from selecting their own experts as well.[841]

In California for example the judge may control the mode of questioning of a witness and comment on witness credibility;[842] the judge has a duty to do justice by bringing out all the facts relevant to a jury's functions,[843] but it is misconduct and reversible error for the judge to disparage, be discourteous or to create the impression that it is aligning itself with a party.[844] A California Appellate Court reversed a drug sale conviction finding that a trial judge asked questions at great length, emphasizing weaknesses in the defendant's case, framing the questions in a disparaging adversarial and repetitious manner in such a way that the questions reflected disbelief of the defendant's assertions and alignment of the Court with the prosecution.[845]

---

mode the defendant, usually interrupting his testimony during the case in chief, thereby preventing the defendant from telling his version of the facts to the jury).

[841] Fed. R. Evid. 614, 706.

[842] People v. Calderon, 9 Cal. 4th 69, 75 (1994); People v. Fudge, 7 Cal. 4th 1075, 1108 (1994).

[843] People v. Curlucci, 23 Cal.3d 249, 255-256 (1979).

[844] People v. Carpenter, 15 Cal.4th 312, 212 (1997); People v. Fudge, *supra* note 842, at 1107; People v. Clark, 3 Cal.4th 41, 143 (1992).

[845] People v. Santani, 80 Cal.App.4th 1194, 1200-1207(2000).

The New York view is less expansive, permitting judicial questioning "only when necessary to clarify confusing testimony or otherwise to facilitate the orderly and expeditious process of the trial."[846] A New York Appellate Court reversed a trial judge during a bench trial of a civil case who intra trial ordered the testimony by deposition of new witnesses located out of the county, finding that the Court exceeded its authority and abandoned impartiality.[847]

The prevailing attitude in the comparator jurisdictions regarding excessive judicial intervention is captured in the following quote:

> "Although you may be the smartest and wisest Judge anywhere, when you are trying a case that you have to decide you are dependent on the lawyers. It's very hard to be better than the lawyers. So the whole thrust of your pretrial and trial conduct in a case to be submitted to you is to help the lawyers to do their thing so that your brilliance and wisdom will be permitted to do justice."[848]

An unspoken but likely concern of the England and Wales legal establishment is that non-jury trials will ultimately become comparable to the civil system, referred to by Damaška as the continental criminal trial. That concern is likely because the organized bar has arrived at the same conclusion as Damaška, "the common law jury trial presents

---

[846] Michael M. Martin, Daniel J. Capra, & Faust F. Rossi, New York Evidence Handbook 608-109 (Aspen 1997); *see* People v. Yu and Wai Tom, 53 N.Y.2d 44, 56 (Ct. App. 1981) ('The trial judge's role is neither that of automation nor advocate"); People v. Mendes, 3 N.Y.2d 120 (Ct. App. 1957). Both cases stand for the notion that the trial judge should question in a jury trial with caution, not express disbelief or partiality or opinion as to credibility.

[847] Carroll v. Gammerman, 193 A.D.2d 202, 205-206 (N.Y. App. Div. 1st Dept. 1993).

[848] Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge,* 64 Va. L. Rev. 1, 81 (1978), *quoting* Jointer, Non-Jury Trials, in Seminars for Newly Appointed United States District Judges, 1973-75, 305, 309 (Federal Judicial Center ed. 1976).

the prosecution with more evidentiary obstacles than does the continental criminal trial."[849]

Damaška argues that the difference in fact finding methodology between the two systems is such that the civil law system creates fewer legal impediments than the jury trial. Thus, for the bench trial to be truly attractive as an alternative in the comparator nations, uniformity in the application of the rules of evidence would seem essential, as well as just.

The analysis may be even more complex as the movement toward non-jury trials reflects a philosophical shift that is best evidenced by the work of Herbert Packer who articulated the due process and crime control models of criminal justice systems.[850]

The government of England and Wales seems to seek a form of the crime control model with its most recent proposals to limit the right to silence, diminish the hearsay rule and enlarge the inferences that can be gleaned by jurors.[851] It is useful to examine this theory of criminal process and to contrast it with the due process model identified by Packer and analyzed by Damaška, because the analysis givens a potential philosophical context for the present England and Wales debate and analogous roadmap going forward. The crime control model favors efficiency, that is the system's capacity to apprehend, try, convict, and dispose of a high proportion of criminal offenders whose offenses became known:

---

[849] Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 507, 554 (1973).
[850] Herbert L. Packer, The Limits of the Criminal Sanction, 149 (Stanford, California: Stanford U. Press 1968).
[851] Criminal Justice Act, 2003, c. 44, §§ 98, 99; Criminal Justice & Public Order Act, 1994, c. 33, §§ 34-37; Criminal Justice Act, 1987, c. 38, § 2.

"The model , in order to operate successfully, must produce a high rate of apprehension and conviction and must do so in a context where the magnitudes being dealt with are very large, and the resources for dealing with them are very limited. There must then be a premium on speed and finality. Speed, in turn, depends on informality and on uniformity; finality depends on minimizing the occasions for challenge. The process must not be cluttered with ceremonious rituals that do not advance the progress of a case. Facts can be established more quickly through interrogation in a police station than through the formal process of examination and cross-examination in a court; it follows that extrajudicial processes should be preferred to judicial processes, informal to formal operations. Informality is not enough; there must also be uniformity. Routine stereotyped procedures are essential if large numbers are being handled. The model that will operate successfully on these presuppositions must be an administrative, almost a managerial, model. The image that comes to mind is an assembly line or a conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or to exchange the metaphor for the reality, a closed file.

The criminal process, on this model, is seen as a screening process in which each successive stage – prearrest investigation, arrest, post-arrest investigation, preparation for trial, trial or entry of plea, conviction, and disposition—involves a series of routinized operations whose success sis gauged primarily by their tendency to pass the case along to a successful conclusion.

It might be said of the Crime Control Model that, reduced to its barest essentials and when operating at its most successful pitch, it consists of two elements: (a) an administrative fact finding process leading to exoneration of the suspect, or to (b) the entry of a plea of guilty."[852]

This is to be contrasted with the due process model, defined as follows:

---

[852] Herbert L. Packer, *Two Models of The Criminal Process,* 113 U. Pa. L. Rev. 1, 10-11, 13 (1964-1965).

> "The combination of stigma and loss of liberty that is embodied in the end result of the criminal process is viewed as being the heaviest deprivation that government can inflect on the individual. Furthermore, the processes that culminate in these highly afflictive sanctions are in themselves coercive, restricting, and demeaning. Power is always subject to abuse, sometimes subtle, other times, as in the criminal process, open and ugly. Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, on this model, be subjected to controls and safeguards that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, while no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual."[853]

The due process model implements these values based on the notion of legal guilt versus factual guilt. In short, factual proof must be presented in a "procedurally regular fashion and by authorities acting within the competences duly allocated to them", consistent with the rules designed to safeguard the integrity.[854]

The concept of legal innocence, an extension of the presumption of innocence, is expanded enormously when the criminal process is viewed as the appropriate forum for correcting its own abuses".[855]

Packer identified the two process models shortly after the United States Supreme Court decided that there was a constitutional right to counsel in all criminal cases involving the

---

[853] *Id.* at 16.
[854] *Id.*
[855] *Id.* at 17.

potential for jail and suppressing the confession of a suspect who is induced to confess by an interrogation held even after requests to consult with counsel (and while counsel was attempting to consult with the suspect).[856] He saw the American justice system at that time also as far more consistent with the crime control model but the above referenced U.S. Supreme Court decisions as moving toward the due process model.

Damaška views the crime control model as favoring administratively adjudicated outcomes while the due process model favors judicial (trial) fact finding.[857] Damaška maintains that the ultimate preference for judicial fact finding in the due process model is not that the judicial fact finding process "emanates from the cluster of ideas revolving around the primacy of the individual ..."[858] Rather Damaška views the rival models of trial procedure, civil and common law, as having "the core of opposition seem(s) to lie in alternative ways of conceiving the adjucators role: judicial passivity (the umpire) is juxtaposed with judicial activity (a researcher pursuing the actual facts)."[859]

The concern in England and Wales therefore must be that this is an attempt to modify the judicial role and that the trial judge will become more the researcher as in Diplock trials than the passive umpire.[860] It is difficult to draw any other conclusion given the sense of urgency on the part of the government with no actual crisis at hand. The House of Lords debates preceding the adoption of Criminal Justice Act 2003 demonstrated per Lord

---

[856] Gideon v. Wainright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964).
[857] Mirjan Damaška, *supra* note 850, at 575.
[858] Mirjan Damaška, *supra* note 850, at 576.
[859] Mirjan Damaška, *supra* note 850, at 571.
[860] John Jackson & Sean Doran, *supra* note 834, at 130-63; Sean Doran, John D. Jackson, & Michael L. Siegel *supra* note 672, at 39-40.

Thomas of Gresford that the conviction rate in all frauds trials is between 83-87% of those tried substantially "higher than the percentage of those convicted in all other trials".[861] While the overall outcome achieved by the Serious Frauds Office is substantially less, there is no indication that the diminished verdict success rate for the prosecution is any way attributable to jury malfunction.[862] The leading anecdotal example offered by the government as proof of jury failure is the so-called Jubilee Line cases which resulted in a collapsed trial after over one year from the commencement of the trial, the Inspector General totally exonerated the jury from any responsibility for that misadventure, instead attributing the failure to bring the case to a verdict of any type, much less a conviction was a series of tactical failures on the part of the prosecution, a lack of management and control of the case by the Court, and a convergence of the poor health of the defendant and a juror, as well just plain bad luck.[863]

> "This outcome was not a systemic failure of the criminal justice system or the nature of jury trial."[864]
>
> "No responsibility for the inconclusive outcome of the case can properly be attributed to the capability or conduct of the jury. Overall, they discharged their duties in a thorough and conscientious manner, and the fact that the trial became unmanageable was not their responsibility."[865]

---

[861] 651 Parl. Deb., H.L. (5th ser.) (2003) 776, *see also* 651 Parl. Deb. H.L. (5th ser.) (2003) 779-780 (Baroness Kennedy of the Shaws).
[862] Serious Fraud Office, Annual Reports 2004-2005, *available at* http://www.sfo.gov.uk/publications/annual_report.asp (reports a 57% conviction rate for that one year).
[863] Stephen Wooler, Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case, at 2, June 27, 2006 (HMCPS1), *available at* http://www.hmcpsi.gov.uk/reports/JubileeLineReponly.pdf.
[864] *Id.* at 2.
[865] *Id.* at 6.

The inescapable conclusion that must be drawn is that the present England and Wales government views the trial judge who becomes the trier of fact in serious frauds cases as moving closer to the continental model of judge, and comparable in activism to the role of the judge in the current England and Wales Civil System. Both the New York State survey and the England and Wales interviews establish that judicial interrogations in bench trials are far more prevalent than in jury trials. Chapter 8 and 9 will further evaluate the significance of this pattern of behaviour.

B. Juror Questioning During Trial

Permitting jurors to question was perceived by judges in one study as a "benefit-reducing complexity – from one practice – allowing jurors to submit written questions – that reduced their perceptions of evidentiary (but not overall case) complexity".[866] This study concluded that longer trials were also perceived as complex by the survey of judges, lawyers and jurors, but theorizes that perhaps this is because complicated cases take more time to try.[867]

One survey suggests that the practice of permitting jurors to submit questions to witnesses is not uncommon and is utilized in a number of American jurisdictions, with variations regarding the method of administration of the questions.[868]

---

[866] Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. Empirical Legal Studies 331, 365 (2004).
[867] *Id.* at 361.
[868] Thomas Lundy, *Jury Instruction Corner: Propriety of Permitting Jurors to Submit Questions for Witnesses: Instructional Safeguards to Consider If Juror Authored Questions are Allowed*, 26 Champion 48 (2002).

1. The New York State Rule

New York State allows jurors to ask clarification questions, although the procedure has historically rarely been used and is regarded as experimental but is recently favored by the Chief Judge of the State.[869] Moreover, a New York State study found that while 8% of judges looking at the same trial as jurors found the trial to be complex, nearly 50% of the jurors found the same trials to be complex.[870] The conclusion of New York State's Chief Judge is that jury questioning for clarification should be encouraged, particularly in complex trials, because it will help keep juror attention and provide a mechanism to reduce complexity.

2. The Federal Rule

Every United States Circuit Court of Appeals which has considered the practice of jury questioning has permitted it based on the reasoning that the decision to permit jury questioning is in the discretion of the trial judge.[871] But jury questioning is not warmly received by the United States Federal Circuit Courts. While one Circuit has overturned a verdict based on extensive jury questioning in a non complex case[872], and while all Circuits discourage jury questioning, the procedure uniformly recommended is the

---

[869] N.Y. Office of Court Admin., Jury Trial Innovations in New York State: A Practical Guide For Trial Judges 4-5 (2005). The jury may submit questions to the Court who issues on the record rulings on the questions after permitting objections by counsel presumably out of the presence of the jury. The project monitored jury questions in 74 trials. Jury questions averaged 4.7 questions per criminal trial, added 15 minutes to the trial. 157 criminal trial questions submitted to the jury 25 questions objected to and 2 of those proposed were sustained as objectionable.

[870] *Id.*

[871] U.S. v. Collins, 226 F.2d 457 (3d Cir. 1999); U.S. v. Feinberg, 89 F.2d 333 (7th Cir. 1999); U.S. v. Hernandez, 176 F.2d 719 (3d Cir. 1999); U.S. v. Bush, 47 F.3d 511 (2d Cir. 1999); U.S. v. Cassiere, 4 F.3d 1006 (1st Cir. 1993); U.S. v. Greene, 998 F.2d 604 (8th Cir. 1993); U.S. v. Polowichak, 783 F.2d 410 (4th Cir. 1986); U.S. v. Callahan, 588 F.2d 1078 (5th Cir. 1979).

[872] U.S. v. Bush, *supra* note 871.

submission of questions by jurors in a non-deliberative mode (they do not collaborate in preparing the question) because a main risk of jury questioning is premature deliberation coupled with a loss of jury neutrality.[873]

3. The California Rule

California does not have a formal rule regarding permitting jurors to question witnesses. However, the custom and practice permits juror questions.[874] California Courts hold that it is preferable that the trial judge rather than the jurors pose the questions in some instances, however a trial court allowing the prosecutor to pose juror questions would not be reversible error.[875] Indeed an approved method in California is to permit the jurors to submit questions to the judge when a witness has completed testimony, the judge reviews the questions and takes objections from counsel and then permits the attorney who called the witness to ask the question.[876]

4. The Canadian Rule

There are no limitations on juror questioning during the trial, although it is rare, and many judges do not permit it.[877]

---

[873] Michael H. Graham, Handbook of Federal Evidence 83-89 pocket part (5th ed., West Group Publishing 2005).
[874] Author interview with Judge Peter Lichtman of Superior Court, Los Angeles County (December, 2005); People v. Anderson, 52 Cal.2d 453, 481 (1990).
[875] People v. Majors, 18 Cal.4th 385 (1998) (reasoning that the witness to whom the juror questions were propounded was primarily questioned by the prosecution.
[876] People v. Cummings, 4 Cal.4th 1233, 1305 (1993).
[877] Law Reform Commission, Working Paper ch. 2 at 118-119 (Canada: Law Reform Commission), *cited in*, Jury Service in Victoria ch. 2, *available at* http://www.parliament.vic.gov.au/lawreform/jury/default.htm.

The recommended procedure in Canada and specifically in Quebec is for the jurors after counsel have questioned, to write down any questions and submit the same through the Sheriff who perfumes a bailiff function to the judge with the judge ultimately deciding whether or not to ask the question.[878] Jury questions during deliberations are answered in a procedure set forth in the Jurors' handbook, which requires a comprehensive and accurate response.[879] The Model Jury Instructions published by the Canadian Judicial Council set forth the procedure as follows:

> "[1] It is not the role of jurors to conduct the trial. It is your duty to consider the evidence that is presented, not to decide what questions the witnesses should be asked or how to ask them.
> [2] Sometimes you might wish to ask a witness questions. It is usually best to listen to the rest of the witness's testimony in case you question is answered later. It may even be answered by another witness. This is why it is generally best simply to be patient and listen closely to all the evidence.
> [3] However, if there is an important point that you believe needs to be clarified, put up your hand to indicate that you have a question. Please hand you question to me in writing. After I have read the question, I will decide what to do. I may need to ask you to go to the jury room while I discuss the question with the lawyers.
> Footnote 6: This instruction is optional. It should only be given when the judge decides to permit jurors to ask questions and to tell them that they may do so."[880]

---

[878] *Id.*
[879] *Id.*
[880] Canadian Judicial Council, Model Jury Instructions (2004), *available at* http://www.cjc-ccm.gc.ca/article.asp?id=2337.

5. The England & Wales Rule

While jurors in England and Wales are permitted to ask questions, juries are rarely told they have this right and the exercise of the right is limited.[881] It is a right that has existed at common law in England and Wales and the United States, but has been in some disuse.[882]

As noted above, New York State appears to be a leading jurisdiction in concluding that juror questioning is desirable and that such questions can play a significant role in permitting jurors to better understand complex cases. Labeled "Jury Trial Innovations in New York State Enhancing The Trial Process for All Participants", a committee appointed by the Chief Judge published a manual outlining several proposed methodologies for juror questioning, setting forth the results of an extensive study. This notion is resisted by England and Wales and the U.S. Federal Courts, while Canada and California permit juror questioning but have not taken a formalistic or highly supportive approach to the concept.[883]

---

[881] Viscount Runciman, The Royal Commission on Criminal Justice (HMSO 1993) at 134: "Some Judges, according to the Crown Court Study, are doubtful about the wisdom of encouraging jurors to ask questions, but are normally reluctant to do so (46% of the jurors said that they had wanted to ask a question during the trial but only 8% had actually done so)".

[882] Shari Seidman Diamond, *Juror Questions At Trial – In Principle and In Fact*, 78 N.Y. St. B.A. J. 22 (Oct. 2006); *see also* U.S. v. Bush, *supra* note 872, at 515.

[883] N.Y. Office of Court Admin., Jury Trial Innovations in New York State: A Practical Guide For Trial Judges 4-5 (2005) ("Jurors did not go on fishing expeditions. In civil trials an average of 2-5 questions were asked. In criminal trials an average of 4.7 questions were asked.") And the study found that "jurors rarely asked improper questions."

IX. Comparing Appellate Review Between Judge Only and Jury Trials.

All comparator jurisdictions apparently accord judge only trials much wider latitude on evidentiary issues, if not all matters of trial conduct. Appellate Courts are more likely to overturn a jury verdict than a bench trial verdict.[884]

Jackson and Doran found only one Diplock case where the Court of Appeal quashed a defendant's conviction based on excessive judicial intervention.[885] An analysis of the Diplock Courts in the 1990s concluded that the posture by the Northern Ireland Court of Appeal "has been a wariness of intruding upon the area of the judge's fact-finding responsibility".[886] However in England and Wales, Courts have periodically reversed convictions and articulated the need for judges to be balanced and minimalist in their interventions.[887]

In R. v. Leggett, Farmer and Hircock[888] the Appellate Court upheld as safe a verdict of conviction after the judge had said "Oh, God" and had sighed and groaned during defense

---

[884] Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 Or. L. Rev. 61, 100 (2000), *citing* Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants Advantage*, 3 Am. L. & Econ. Rev. 125 (2001).

[885] John Jackson & Sean Doran, *supra* note 593, at 104, 105, *citing* R. v. Thompson, [1977] NI 74, 83, (the authors argue that the Court primarily objected not to the Court's invasive questioning, but rather that the court appeared to have its mind made up.").

[886] Sean Doran, John D. Jackson, & Michael L. Siegel, *supra* note 672, at 49, *citing* John D. Jackson & Sean Doran, *Miscarriages of Justice: The Role of the Court Appeal in Northern Ireland,* Standing Advisory Commission on Human Rights, Seventeenth Report, 275-80, n. 205 (1992).

[887] Jones v. National Coal Board, [1959] 2 Q.B. 55, 63-64 (holding that judicial questioning so invaded the trial that new trial was required), *citing* as precedent Ex Parte Lloyd, [1822] Mont. 70, n.8; Yuill v. Yuill, [1945] P. 15, 20, 61 T.L.R. 176, 1 All E.R. 183 (stating that if a Judge conducts the examination of a witness "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict.").

[888] R. v. Leggett, Farmer and Hircock, (1968) 53 Cr. App. Rep. 51.

counsel's closing speech. The Court reasoned that the trial judge's exclamation had not prohibited the content of defendant's counsel's speech.[889]

The Appellate notion that judges do not require the same scrutiny in terms of fact finding where inadmissible evidence is heard by the judge should be in some dispute based on the results of a recent detailed study suggesting the need for a more careful analysis of judicial decision making:

> "On balance, then, our results suggest that those clamoring for a judge to replace juries should proceed with caution. Judges are likely to make better decisions in certain circumstances because their training and experience will enable them to avoid the more pernicious effects of such cognitive decision-making phenomena as the representativeness heuristic. On the other hand, group decision making or the insulation afforded by a judicial gatekeeper may enable juries to make better decisions than judges in other circumstances."[890]

This study finds that judges are influenced by four cognitive illusions which also effect jurors and others: anchoring (making estimates based on irrelevant starting points), framing (treating economically equivalent gains and losses differently), hindsight bias (perceiving past events to have been more predictable than they actually were), and the representativeness heuristic (ignoring important background statistical information in favor of individual information).

---

[889] *See* John Jackson & Sean Doran, *supra* note 573, at 106.

[890] Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 68 Cornell L. Rev. 777 (2001). Heuristics according to Psychologists are mental shortcuts humans rely upon to make complex decisions.

Rachlinski also found that judges confused "consistent with" and "probative".[891]

Rachlinski found that although it is possible that "Judges make better decisions than juries, there is little evidence to support this".[892] He concludes based on his own work and those of others that judges are susceptible to hindsight bias and specifically cognitive illusions such as framing effects, egocentric biases, hindsight bias, and as mentioned above, a misapplication of the representative heuristic.[893]

American Appellate review of non-jury trials is quite different from jury trials in that the trial judge's fact finding is presumed to follow the evidence rules – even when inadmissible proof is presented at the bench trial. In fact, it is general practice in bench trials for judges to admit otherwise inadmissible evidence "for what it is worth",[894] however it has been observed that "the failure to rule becomes a convenient means available to the judge for avoiding error. But it means, of course, that the criminal defendant does not truly receive the benefit of the evidentiary protection".[895]

---

[891] Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 Or. L. Rev. 61 (2000). He defines the representativeness heuristic as follows at 82: ". . . people make categorical judgments primarily by assessing the degree to which the event resembles the category. When the event is similar to the category, people judge the likelihood that the event is a member of that category as high; when the event is not similar to the category, people judge the likelihood that the event is a member of that category as low. Psychologists refer to this decision-making strategy as the representativeness heuristic."

[892] *Id.* at 100.

[893] *Id.* at 101.

[894] Charles T. McCormick, McCormick On Evidence § 60 (5th ed. John W. Strong ed., 2004).

[895] Sean Doran, John D. Jackson, & Michael L. Siegel, *supra* note 672, at 30. Certain commentators have criticized this practice as particularly unfair to the Defendant in the context of American Appellate Courts generally according the trial judge in a bench trial the presumption of having discounted improper evidence. *Id.* at 31, *also citing* Note: *Improper Evidence in Non-Jury Trials: Basis for Reversal?*, 79 Harv. L. Rev. 407, n.128 (1965).

For example, some New York State Appellate Courts have held that the judge in a bench trial is presumed to have considered only the competent evidence in reaching a determination despite the absence of a ruling on proffered inadmissible evidence.[896] Thus palpably inadmissible questions about the accused's pretrial silence when questioned or about a prior bad act[897] or improper questions about prior traffic infractions because they are in the context of a bench trial are regarded on appeal as harmless error.[898] At least some Appellate Courts have not viewed this as automatic and have based their affirmance of a bench verdict, for example, where erroneous evidence was allowed, on the trial court's affirmative representation that it would not consider the erroneous evidence.[899]

However other courts have upheld the presumption in the wake of no such representation and in the absence of a showing of prejudice, reasoning that the judge must have considered only the competent evidence at trial in reaching the verdict.[900] In a bench trial, the judge's factual findings are accorded great deference, as the findings resolve issues of credibility.[901]

In United Sates Federal District Courts, a comparable body of decisional law holds that where a judge improperly over objection admits evidence, the same is disregarded if the

---

[896] People v. Majeed, 204 A.D.2d 986 (N.Y. App. Div. 4th Dept. 1994); *see also*, People v. Dazi, 195 A.D.2d 571, 600 N.Y.S.2d 276 (N.Y. App. Div. 2nd Dept. 1993).
[897] People v. Torres, 249 A.D.2d 229, 673 N.Y.S.2d 72 (N.Y. App. Div. 1st Dept. 1998).
[898] People v. Taylor, 135 A.D.2d 848 (N.Y. App. Div. 2d Dept. 1988).
[899] People v. McIlwain, 188 A.D.2d 666 (N.Y. App. Div. 2nd Dept. 1992).
[900] People v. Sims, 127 A.D.2d 805 (N.Y. App. Div. 2d Dept. 1987).
[901] People v. Van Akin, 197 A.D.2d 845 (N.Y. App. Div. 4th Dept. 1993); People v. Balacky, 203 A.D.2d 471 (N.Y. App. Div. 2nd Dept. 1994).

court upon review of the record finds that competent evidence supports the result.[902] The reasoning is that "The judge will be presumed to have disregarded the inadmissible and relied on the competent evidence".[903] A later edition of McCormick on Evidence explains how the appellate jurisprudence regarding non-jury trials has caused conflicting customs and practices:

> "However, where the admissibility of evidence is debatable, the Appellate Court's contrasting attitudes toward errors in receiving and excluding evidence account for the emergence of the practice adopted by many experienced trial judges cases; that practice is to provisionally admit all arguably admissible evidence, even if objected to with the announcement that all the admissibility questions are reserved until all the evidence is in. In considering any objections renewed by motion to strike at the end of the case, the Judge leans toward admission rather than exclusion but seeks to find clearly admissible testimony on which to base his findings of fact. The practice lessens the time spent in organizing objections and helps ensure that appellate courts have in the record the evidence that was rejected as well as that which was received."

An obvious problem with this scenario is that it is a virtual deception which fails to give the Appellate reviewers a clear indication as to what weight the court may actually give either the inadmissible evidence received or the admissible evidence wrongly dismissed as received for what its worth and ignored. In a jury trial, evidence is either received or it is not. In a bench trial, it is received more likely than not, but its significance to the trier of fact is veiled in the disguise of "for what its worth."

---

[902] Plummer v. Western Int'l Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981).
[903] Edward W. Cleary, McCormick on Evidence § 60 (2d ed. 1972).

Without a clear cut requirement that the evidentiary rules be applied equally between bench and jury trial, a Defendant would properly be concerned that judicial abuses during bench trials will not receive adequate appellate review.

X. Conclusion

While the jury trial remains a healthy institution, it is the ongoing subject of critical review. There also remains a natural distrust, particularly in America and England and Wales, of the bench trial. It is a small wonder there remains a raging dispute between advocates the two modes of trial, given the disparate applications of the rules of evidence, different judicial conduct, and the disparate wide berth granted by Appellate Courts to bench decisions.

Complex trials tried before a judge are likely more efficient in terms of time expended. A judge is likely better equipped to sort through complex or prejudicial proof, but not always. In the common law system the prosecution gets to frame the case before indictment with little input from the defendant. If there is a right to a jury trial, as in America, it is the defendant's right. The conclusion that the defendant should be allowed to choose the mode of trial, forming his/her own judgments to which mode will offer a better understanding of the facts in the case is more readily reached based on this review of the rules of evidence. The next two chapters will demonstrate that U.S. judges and lawyers and English judges find that the rules of evidence change in bench trials. Given that those rules include the potential exclusion of relevant evidence, the application of

inferences and other substantive evidentiary rules like hearsay, the mode of trial debate in England and Wales raises issues regarding the application of evidence that could profoundly impact on whether or not a human rights/civil rights model remains the overriding objective of the English court system.

CHAPTER 8

A SURVEY OF NEW YORK JUDGES AND LAWYERS TO: 1) DETERMINE THE REASONS FOR MODE OF TRIAL CHOICES, 2) COMPARE JUDICIAL BEHAVIOUR IN BENCH AND JURY TRIALS, AND 3) COMPARE THE APPLCIATION OF KEY EVIDENTIARY RULES IN BOTH MODES OF TRIAL

I. Introduction

As Chapter 6 notes, freedom on the part of the defendant to choose the mode of trial has been the subject of either debate or legislation in the comparator jurisdictions. New York State offers the defendant clear control over the mode of trial choices in criminal cases. But as Chapter 6 demonstrates the mode of trial choice most frequently selected is the jury trial, not the bench trial, and that is particularly true of corporate defendants, which generally have the more complex charges against them and which might be expected to opt for a judge only trial for that reason among others. Moreover concern is expressed that in the comparator jurisdictions that the quality of bench trials is diminished as compared to jury trials. Chapter 7 outlined the contentions that judges are invasive in their questioning in bench trials and that the rules of evidence are unevenly applied when comparing bench trials to jury trials. Moreover, chapter 7 detailed the widely held belief in all of the comparator nations that while bench trials are more efficient (brief) than jury trials, pretrial proceedings in bench trials may prejudice the judge and the very efficiency of a bench trial may be achieved to the prejudice of the defendant.

Scrutiny of the jury trial showed an overarching concern, examined in chapters two through four, that juries may not be up to the task of deciding complex cases. There is a lingering question as to whether or not new inclusive rules regarding the composition of the jury pool creates unfairness to the litigants and that a retooling of the rules of evidence may be in order.

This chapter will analyze two surveys, one of New York State judges and the second of selected New York State lawyers on the main issues covered in prior chapters. Chapter nine will engage in an analysis of comparable issues based on interviews with nine England and Wales judges certified to try serious fraud cases.

Two parallel surveys were conducted in New York State. One surveyed all of the full-time New York State trial judges who are authorized to conduct both bench and jury trials. (Annex A) The attorney survey was administered to the New York State members of the American College of Trial Lawyers, the group of American lawyers who most frequently try complex cases (Annex B). The compiled statistical results of the survey are attached as well (Annex C).

It was the objective of each survey to ascertain the basis for mode of trial choices in New York State, to evaluate and compare the application of procedural rules and rules of evidence in each mode of trial, to determine attorney/judge agreement with outcomes and to examine discrete issues relevant to judge and jury trials. Civil cases were deemed relevant to the study of mode of trial decision making because in New York State civil

cases are usually tried by jury and generally of sufficient complexity, particularly in the tort field, to require expert testimony. Moreover, while the standard of proof is different in civil trials as compared to criminal trials (predominance of the evidence as compared to beyond a reasonable doubt) the rules of evidence are otherwise virtually the same. As discussed in detail in previous chapters, in New York State the choice of mode of trial is exclusively made by the defendant in criminal cases, subject to limited judicial approval, but in civil cases the parties elect the mode of trial by either agreeing to a bench trial or if one party selects a jury trial, that demand is controlling.[904] Because the bench trial is utilized in nineteen percent of New York State criminal cases, both judges and lawyers were asked about factors that are considered in choosing that mode of trial.

The survey also sought to examine if the role of the trial judge, including behaviour, changes in judge only trials. As has been noted in previous chapters, Doran, Jackson and Siegel and others have argued that both a lack of adversariness and excessive judicial intervention can occur in judge only trials which may adversely impact upon the fairness of the trial. The judges and attorneys were asked detailed questions about judicial conduct in pretrial case management and/or settlement type proceedings. As discussed at length in Chapter 7, a number of commentators, most prominently Doran, Jackson and Siegel have observed that rules of evidence may be different in bench trials as compared to jury trials.[905] The survey conducted herein inquired about judicial and attorney perceptions regarding actual practice based on the concerns articulated by these authors. The results

[904] Civil Practice Rules 4101 and 4102 (McKinneys, 2007).
[905] Sean Doran, John D. Jackson, Michael L. Siegel, *Rethinking Adversariness in Non-Jury Criminal Trials*, 23 American Journal of Criminal Law 1; Stephen Saltzberg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 Virginia L. Rev. 1, 7 (1978).

demonstrate that most of the judges do not think that different evidentiary rules are applied in bench trials, but the attorneys report a difference in the rules of evidence in bench trials as compared to jury trials. The survey inquires as to whether a loosening of the New York State hearsay rule, which is much more restrictive than in England and Wales, is favoured and it asks about the experience of those sampled in trials where jurors with expertise participated in reaching a verdict.

II. Description of Sample

The total sample size was 122 including 80 judges and 42 attorneys.

The judicial sample was selected by identifying every New York State trial judge who hears jury trials and both e-mailing and mailing the survey to them. The lawyer sample was selected by e-mailing and mailing every Fellow of the American College of Trial lawyers, an organization of peer selected lawyers with high experiential and ethical standards generally regarded as the most capable and experienced members of the practicing bar. The results were collected by and analyzed by the New York State Office of Court Administration. The statistical analysis and some textual analysis particularly are fully adopted by the author into this chapter. Moreover the questionnaires which are attached as Appendix A and B were the collaborative effort of the author and the Office of Court Administration.

Most of the attorneys (97.6%) had 10 or more years of experience, with one attorney having less than 5 years.

The judges were more varied in their levels of experience:

14 judges (17.5%) had less than 5 years experience,
17 judges (21.3%) had between 6 to 10 years, and
49 (61.3%) had more than 10 years experience.

Judges with more than 10 years experience were compared to those with less than 10 years. The only major difference was that judges with more experience had tried more cases, which is logical. There were no other significant differences between judges with more experience and those with less.

Most of the attorneys were in civil practice (n = 36). The attorneys were evenly split on whether their practice was predominantly state or federal. 76% (n = 38) of attorneys reported their most recent case tried to verdict was a jury trial, 56% (n = 27) were in State court, and 80% (n = 25) tried a civil case.

The majority of attorneys (63.4%) participated in between 1-49 civil jury trials; judges were slightly more varied, though not significantly different – 58% of judges participated in 99 or fewer civil jury trials, while 36% participated in more than 100 civil jury trials. Attorneys overwhelmingly (86.8%) had participated in 1-49 civil bench trials; over half of the judges (55.7%) also chose this category, but 13 judges (18.6%) had presided in over 200 civil bench trials. Attorneys participated in less than 50 criminal jury trials, while judges were again more varied and had presided over more criminal jury trials in general. Finally, the majority (54.5%) of attorneys said they had not participated in a

criminal bench trial, while the majority of judges (55.6%) said they had presided over 1-49 criminal bench trials.

Regarding the average length of trial days, regardless of whether the case was civil or criminal, judges more frequently said the case took 1-5 days if it was "not complex" and 10 days or less if it was "complex." Interestingly, judges frequently said "doesn't apply" to complex cases indicating that in the past 5 years they had not encountered a complex case. Attorneys indicated that complex jury trials take at least 6 days, with the most frequent response being "more than 10 days." A total of 26 attorneys did not answer or chose "does not apply" when referring to non-complex jury trials, indicating on the attorney side, they have not had a non-complex case in the last five years. 36 attorneys did not answer or chose "does not apply" regarding non-complex bench trials indicating that attorneys rarely participated in such trials.

III. Findings and Analysis [906]

A. Trial Complexity\Trial Duration

1. Findings

Attorneys are more likely than judges to believe that their cases are complex. Most attorneys say that 75% to 100% of their cases are complex, while judges believe that between 25% and 50% of their case load are complex.

Where bench trials are conducted in complex cases, both criminal and civil, they are generally less lengthy than complex jury trials.

Of the judges who reported trying complex criminal trials, 47% found the average duration of complex jury criminal trials to be 6 to 10 days, 41% more than 10 days, and 12% 1 to 5 days, as compared to average criminal complex bench trials in which the response was reversed with 73% reported complex trials of 1-5 days, 21% 6-10 days, and 6% 1-5 days.

The judges also found the average duration of the complex civil jury trial to be significantly longer than the complex bench trial. 7% answered that complex jury trials averaged 1-5 days, 62% 6-10 days and 31% more than 10 days; whereas complex bench

[906] When applicable, chi-square tests of significance were used to examine differences in response patterns between judges and attorneys. Due to a smaller attorney sample size and a large portion of attorneys not answering relevant questions (for example at least 16 attorneys did not answer the questions regarding the reasons for or against a bench trial leaving n = 26 for those questions compared to n = 76 for judges), some of the results should be viewed with some skepticism as several cells would often contain expected counts less than 5, which is a chi-square "red flag."

trials were 1-5 days according to 8%, 6-10 days in the opinion of 47% and exceeded 10 days in the opinion of 5%.

Lawyers asked about both types of cases opined that the average jury trial in complex cases was 1-5 days according to 15%, 6 to 10 days according to 36% and 49% answered more than 10 days. Complex bench trials were reported to be 1-5 days by 48% and 6-10 days by 52%.

2. Analysis

It is well known that complexity is a subjective definition. The survey did not request a definition of complexity from either the judges or the lawyers.

The relative similarity of the report of trial duration between complex and non complex cases would suggest that there was reasonable commonality between the bench and the bar regarding the definition. Moreover the extent to which complex bench trials are more brief than complex jury trials supports the assumption by the proponents of bench trials in serious fraud cases that those trials will be shorter in duration than a jury trial on the comparable subject matter. As we will see in the next chapter, nine judges who try serious fraud cases in England and Wales do not unanimously agree with the assumption that bench trials will be of a shorter duration than jury trials.

The result from the New York State survey confirms the belief held both in England and Wales and the U.S.A. that bench trials in complex cases will require less time to try to a conclusion than jury trials.

B. Reasons for or against Considering/Choosing a Bench Trial

1. Findings

Bench trials are rarely considered. Judges believed that attorneys "sometimes" to "rarely" consider a bench trial (79% total) and attorneys agreed (74%).

a) Judge and Attorney Responses

Questions covering reasons why an attorney would or would not consider a bench trial were questions 5-8 for judges and 12 & 13 for attorneys in Annex A and B respectively. The judge questionnaire specified civil/criminal, jury/bench while the attorney questionnaire did not. The questionnaire design assumed that attorney respondents would be evenly distributed between civil and criminal practitioners. As it turned out there were only 8 attorneys whose practice was predominantly criminal. Therefore, it is not appropriate to compare the judges' answers about criminal trials to the attorneys' answers. The comparisons focus on the civil questions.

Judges and attorneys were similar when it came to reasons why attorneys would or would not choose a bench trial in a civil case. Chi-square produced only two significant

differences in the civil questions.[907] These results are based on the 22 civil attorneys who answered these questions and exclude the 16 who failed to answer. These 22 attorneys do not differ significantly in other ways from those who did not answer. Removing the criminal attorneys from the comparison did not alter the findings.

1. Judges believe that the likelihood of a prompt trial is a "somewhat" to "very important" reason why attorneys consider a civil bench trial, while attorneys selected "not at all important" or "somewhat" for a prompt bench trial in general since they were not asked civil or criminal.

2. Judges believe that the lower cost of a bench trial is a "somewhat" to "very" important factor in considering a civil bench trial; attorneys were more likely to choose "not at all important" for bench trials in general.

There were no other significant relationships between responder's group membership and response. Since 16 attorneys did not answer questions 12 & 13 inquiring about the reasons for selecting bench trials, all results, significant or not, are subject to question. It is possible that this low response rate was, as indicated earlier, a result of the fact that most attorneys rarely consider a bench trial.

[907] A chi-square test is used to test relationships between categorical variables. A significant chi-square indicates that there is a relationship between the two categories, such that if you fall into one category on one variable, you are more likely to fall into a particular category on the other variable. In this case, a significant chi-square indicates the response pattern depends on who is responding (judge or attorney) – judges and attorneys respond differently from each other. Results reported were significant at the .05 level.

b) Judges' Responses to Criminal Trial Questions

Judges' responses to these questions tended to occur in pairs, such that the most frequent responses to a question were "very important"/"somewhat important" or "somewhat important"/"not at all important" with neither of the pair being clearly the most frequent response.

Judges considered the following factors to be "very important" or "somewhat important" when an attorney decides not to choose a bench trial: the identity of the judge, the personality of the judge, and the fact that a jury might be more sympathetic. Those factors that were considered "somewhat important"/ "not at all important" were the application of rules of evidence and whether the judge was active in questioning. There was only one factor regarding why attorneys do not choose a criminal bench trial that garnered a clear response – judges thought concern over less appellate review was "not at all important" in the decision to not choose a bench trial.

As for the decisions to consider or choose a criminal bench trial, judges found the following factors "very important"/ "somewhat important": complexity of the case, nature of the case, identity of the judge, and an unsympathetic client. Judges found the following factors "somewhat important"/ "not at all important": trial length, cost, and promptness.

2. Analysis

The identity and personality of the judge is the predominant factor in mode of trial selection.

For example, the judges responded that the identity of the judge according to 65% is the predominant very important factor in the decision to seek a bench trial; 30% rated it a somewhat important factor; and 5% rated not at all important.

According to the judges surveyed another very important factor in the decision to not choose a bench trial is the personality of the judge: 50% rate that factor as very important; 44% somewhat important; and 6% not at all important.

The attorneys concurred, responding that the predominant very important factor for choosing a bench trial is the identity of the judge, 67% rating it very important and 32% somewhat important. None rated it not at all important as a factor. As a factor against choosing a bench trial, 46% rated the personality of the judge as very important, 29% somewhat important and 25% not at all important.

Case complexity was identified by the attorneys as a factor equal in significance to the identity of the judge in the choice of the bench trial as the mode of trial. 66% of the lawyers responding believed that complexity of the case was a very important factor in choosing a bench trial, 32% said it was somewhat important. Slightly less than one half of the attorneys (47%) rated nature of the case as a very important factor, whereas 62% of

the judges rated it as a very important factor in selecting a criminal bench trial. Unlike the lawyers only 35% of the judges viewed case complexity as very important in the selection of bench trials, whereas 50% viewed it as somewhat important in the decision to choose a bench trial.

It is helpful to look at other responses to survey questions to understand why the personality and the identity of the judge is significant, reasoning that these results must be compared to the survey results regarding the applications of the rules of evidence. The attorneys as reported above did not view judges as vigorously applying the rules of evidence regarding a series of evidentiary issues surveyed, including testimonial hearsay, documentary hearsay, prior bad acts, prior criminal record, disclosure discovery compliance and expert testimony based on Daubert or Frye. Moreover the majority of the attorneys in their survey responses answered that trial judges do not apply the rules the same way in a bench trial as in a jury trial. The majority of the judges responded that they did apply the rules of evidence evenly between bench and jury trial. All differences were significant at the .001 level. In terms of rating factors that would militate for or against choosing a bench trial the personality and/or identity of the judge rated as a far more significant factor than issues relating to the application of the rules of evidence. It is difficult to discern, but logical to infer from the questions asked that the precise judicial identity of the trier of fact may suggest how the rules of evidence will be applied and thus factors into mode of trial choices. In terms of verdict agreement, juries' verdicts received 58% lawyer agreement greater than 75% of the time, while judge's verdicts receive a 53% agreement greater than 75% of the time. Overall lawyers agreed with

better than one-half of the judges' verdicts over 93% of the time whereas their agreement with juries was 78%.

Lawyers and judges did acknowledge that a bench trial would not be selected in circumstances where sympathy for the client was an important factor. That may suggest some concern about judicial case hardening in the view of both groups. (Particularly when considered with the attorney response (68%) that the personality of the judge was an important factor against the selection of a bench trial.) On the other hand, both groups acknowledged that an unsympathetic client was a significant factor in the opting for a bench trial, somewhat refuting that inference.

C. Judges' Questions of Witnesses

1. Findings

There was one significant finding in connection with judges' questioning of witnesses in bench trials. Judges were more likely than attorneys to say that they questioned "no witnesses" in a civil bench trial; while attorneys were more likely to say that judges question "some witnesses" in a civil bench trial.

Although not significant, both attorneys and judges responded that "no witnesses" or "some witnesses" are questioned by the judge in civil jury trials. Attorneys were more likely to say that "some witnesses" were questioned (64.1%), while judges were split between "no" and "some," 46.8% and 45.5%, respectively.

Comparisons were not made regarding criminal trials based on lack of attorney data. The majority of judges said they questioned no witnesses during a criminal jury trial.

2. Analysis

Chapter 7 outlines the concerns of commentators such as Stephen A. Salzburg, Sean Doran, and Michael Siegel that bench trials may result in excessive judicial interventions and questioning.[908]

This concern is addressed in the survey both regarding whether or not it is a factor in the choice of mode of trial and whether or not judicial questioning impacts outcome.

The survey suggests that such conduct is not a significant factor in mode of trial selection in the opinion of both the judges and the lawyers.

THE SIGNIFICANCE OF JUDICIAL QUESTIONING IN MODE OF TRIAL CHOICES

	JUDGE SURVEY		ATTORNEY SURVEY
	Civil	Criminal	
Not at all important	49%	55%	52%
Somewhat important	48%	40%	29%
Very important	3%	5%	19%

However, the survey does establish that judges are much more proactive as questioners in bench trials.

[908] Stephen Saltzberg, *supra* note 905, at 7; Doran, Jackson and Siegel, *supra* note 905.

Even accepting that judges may under report their pattern and frequency of questioning, it is quite obvious that the substantially more judicial questioning occurs in bench trials than in jury trials.

THE FREQUENCY OF JUDICIAL QUESTIONING OF WITNESSES

	Judges Survey				Attorneys Survey			
	Jury		Bench		Jury		Bench	
	Civil	Criminal	Civil Bench	Criminal Bench	Civil	Criminal	Civil Bench	Criminal Bench
Do not question	47%	64%	22%	41%	33%	32%	3%	0%
Some witnesses	41%	31%	59%	47%	64%	61%	76%	89%
Most witnesses	5%	2%	16%	10%	3%	7%	21%	11%
All witnesses	2%	35%	35%	35%	0%	0%	0%	0%

Likewise that 46% and 31% of the judges would report respectively that they question some witnesses in civil and criminal jury trials is surprising and is not materially different from the questioning patterns, 59% and 47% in bench trials in the respective categories. This may in part explain why judicial questioning is not a significant factor in the choice of mode of trial.

It is possible that the questioning by the judge is not usually seen as prejudicial by either side. However, the judges did report that 45% of the time their questions are objected to

and that their patterns of cautionary charges after questioning and at the end of the trial do not demonstrate concern that their questioning in jury trials could cause prejudice.

JURY INSTRUCTIONS ABOUT JUDICIAL QUESTIONING AS ANSWERED BY THE JUDGE IN THE JUDGES' SURVEY

	Never	Once in a while	Very often
After questioning	55%	31%	14%
At end of trial	40%	16%	44%

It is somewhat surprising that after engaging in questioning in a jury trial that a significant number of judges never give a cautionary charge about their questions. Generally such a charge would advise the jury that the questioning is for clarification purposes and not to be construed by the jury as indicating a judicial bias or preference for one side or the other.

As noted in the findings there is some disparity between attorneys and judges regarding the frequency of questioning. For example in civil jury trials, 47% of the judges say they question no witnesses, the attorneys stated that was a fact 33% of the time. Moreover it is clear that more judicial questioning occurs in civil bench and criminal bench trials.

The finding that questioning is not a significant factor in mode of trial decisions suggests that lawyers generally do not regard the interventions as prejudicial. This is an issue that calls for more research, however, as the objection patterns reported by judges and the

opinion of the lawyers that there is an uneven application of rules of evidence, and the importance of the personality of the judge in selecting the mode of trial may suggest underlying concerns about fairness and prejudice associated with judicial questioning.

D. Relaxing the Hearsay Rule

1. Findings

Both the judges and the attorneys opposed the idea of relaxing the hearsay rule, with a slightly higher proportion (66.7%) of attorneys opposing it than judges (55.1%).

2. Analysis

Chapter seven detailed the differences between the comparator jurisdictions regarding the hearsay rule. The rule has become far less exclusionary and far more expansive in England and Wales. In the next chapter in which England and Wales trial judges are interviewed about the practical application of the new rule, some enhanced insight is offered to the American bench and bar, (particularly to the opponents to relaxing the rule) as most of the judges found the changes to positively impact upon the trial, noting that juries seem able to evaluate hearsay. It was noteworthy that a significant minority of the New York bench, 43.9%, favoured relaxing the rule, suggesting that some reform might not be overwhelmingly opposed. This question is important because it also suggests that the New York bench and bar may favour a more rigorous application of the hearsay rule in bench trials.

E. Time Limits on Parties during Trial

1. Findings

Both attorneys and judges favoured this idea although only 16 attorneys answered this question.[909] A much higher proportion of attorneys (81.3%) responding to this question favoured the time limits as compared to 58.2% of judges.

2. Analysis

The frequent use of time limits in England and Wales civil cases is essential to the underlying concept of proportionality, which is applied to civil cases. The same precepts are not at work in criminal cases in England and Wales and the use of time limits presently has limited application in America. A willingness to have such limitations on the part of the surveyed judges and the small sample of lawyers responding is at least suggestive that this is a useful trial management technique that could be employed in the future as in England and Wales.

F. Jurors with Expertise

1. Findings

A little more than half (51.2%, n = 21) of attorneys said they had not had a juror with expertise relevant to the case, while 65% of judges said they had presided over a trial where a juror with expertise was on the jury.

[909] No significant difference in pattern of response, although the result was approaching significance, p = .083.

Interestingly, a significant difference was found when respondents were asked whether the judge had provided a special instruction regarding the juror expertise: 82.1% of judges said they had given a special instruction, while 65% of attorneys said in their particular case no special instruction was given.

In the overwhelming majority of cases involving an "expert" juror, the jury reached a verdict. About 60% in both sets of respondents talked to the jury after the verdict and neither group thought the expert juror carried his or her expertise into the jury room. Despite the feeling that the juror did not play a role as an expert in the deliberations, 70% of the 10 attorneys who responded to this question thought the juror's expertise had an impact on the verdict. Judges were split on whether the juror's expertise did not or did affect the verdict: 54.5% and 45.5%, respectively. Judges' response patterns were not significantly different from the attorneys.

2. Analysis

One of the surprising aspects of the answers to the questionnaire is the attorneys' report (albeit a very small sample) that judges in a significant number of cases do not give a special instruction about jurors with expertise. There is a specific jury charge in New York State that should accompany the empanelling of such juror.[910]

[910] New York Pattern Jury Instructions, *Jurors Use of Professional Expertise*, Civil 1:25 A, 46-48.

It is concerning that a significant percentage of both groups questioned found that the juror with expertise may have served as an expert in the jury room, i.e. Attorneys, 48% (N5) Judges 26% (N 9)

It must be argued that any such circumstance creates a miscarriage of justice. It is not the role of the juror to provide expertise that is not subject to proper testing of legal sufficiency as to qualifications, foundation, and cross-examination. The need for more broad based studies is indicated by these findings.

In Chapter nine, England and Wales judges voice similar concerns about permitting judges and police officers to serve as jurors.

The introduction of jurors once disqualified because of their occupation into trial deliberations is an expedition into uncharted waters. The results herein demonstrate that there should be an increased index of suspicion that such jurors could improperly impact outcome, thereby indicating a more extensive study of the issue.

G. Pre-trial Judge Activity/Case Management/Motions

1. Findings

Below is a table of responses for pre-trial activities. Again, attorneys were only asked jury/bench and were not specifically asked criminal/civil assuming that there would be a greater mix of specialization among respondents. Judges, however, were asked both, so

the data was not easily merged. Instead frequencies were run separately and can be compared side-by-side.

Highlighted below are some of the more interesting discrepancies between the two groups. For example, attorneys are less likely than judges to believe that judges read the case file prior to a civil bench trial. Attorneys were similarly less likely to believe that a judge would hold a substantive pre-trial prior to a civil jury or civil bench trial. Finally, for civil bench trials attorneys were less likely to say that judges decide substantive motions which contain potentially prejudicial material and more likely to say that they never made such decisions.

JUDICIAL PRETRIAL ACTIVITIES

		Judge Response (%)	Attorney Response (%)
Read File Prior: (Civil) Jury	Very Often	56%	48%
	Once in a While	24%	41%
	Never	5%	2%
	Not Sure	15%	5%
Read File Prior: (Civil) Bench	Very Often	71%	57%
	Once in a While	16%	31%
	Never	1%	0%
	Not Sure	12%	11%
Read File Prior: (Criminal) Jury	Very Often	59%	
	Once in a While	14%	
	Never	5%	
	Not Sure	22%	
Read File Prior: (Criminal) Bench	Very Often	66%	
	Once in a While	9%	
	Never	7%	
	Not Sure	19%	
Offer Opinions: (Civil) Jury	Very Often	26%	26%
	Once in a While	49%	57%
	Never	10%	0%

	Not Sure	13%	12%
Offer Opinions: (Civil) Bench	Very Often	9%	6%
	Once in a While	34%	40%
	Never	41%	43%
	Not Sure	14%	11%
Offer Opinions: (Criminal) Jury	Very Often	10%	
	Once in a While	38%	
	Never	23%	
	Not Sure	30%	
Offer Opinions: (Criminal) Bench	Very Often	4%	
	Once in a While	23%	
	Never	42%	
	Not Sure	26%	
Substantive Pretrial: (Civil) Jury	Very Often	80%	51%
	Once in a While	11%	41%
	Never	1%	0%
	Not Sure	6%	8%
Substantive Pretrial: (Civil) Bench	Very Often	61%	24%
	Once in a While	20%	44%
	Never	10%	26%
	Not Sure	6%	6%
Substantive Pretrial: (Criminal) Jury	Very Often	58%	
	Once in a While	18%	
	Never	1%	
	Not Sure	17%	
Substantive Pretrial: (Criminal) Bench	Very Often	50%	
	Once in a While	18%	
	Never	11%	
	Not Sure	21%	
Decide Motions: (Civil) Jury	Very Often	48%	50%
	Once in a While	38%	26%
	Never	3%	17%
	Not Sure	12%	2%
Decide Motions: (Civil) Bench	Very Often	42%	29%
	Once in a While	38%	34%
	Never	7%	23%
	Not Sure	13%	14%
Decide Motions: (Criminal) Jury	Very Often	60%	
	Once in a While	11%	

	Never	1%
	Not Sure	27%
Decide Motions: (Criminal) Bench	Very Often	49%
	Once in a While	21%
	Never	1%
	Not Sure	29%

2. Analysis

The statistics suggest the following:

1) Judges who engage in bench trials are significantly exposed to prejudicial and potentially inadmissible information to the extent that the same is within the court's file. In fact, judges acknowledge by a higher percentage that they read the file more often in civil and criminal bench trials than jury trials. A very low percentage of the judges say they never read the file before trying a civil (1%) or criminal (7%) bench case. There must be concern about whether or not the file includes inadmissible information and/or prejudicial information. In both the U.S.A. and England and Wales, for example, the trial judge will know about the defendant's prior criminal record based on pretrial motions and conferences.

2) In a bench trial during the pretrial process judges are much less likely to offer opinions about the case in an effort to settle the case than in a jury trial. However, a majority of the judges (61%) also report that they engage in substantive pretrials very often where the facts of the case are discussed, even though they will be the trier of fact in a bench trial. The attorneys differed in their perception,

offering that judges in civil bench trials will not engage in a substantive pretrial as frequently as in a jury trial, 24% bench trial as compared to 51% jury trials.

3) In criminal bench trials (49%) and civil bench trials (42%) of the judges will decide motions which have prejudicial information within them.

4) Judges are mindful of their role as the trier of fact in bench trials and while they may read the file more often, they do not offer opinions about outcomes of the case in pretrial sessions nearly as frequently as in jury trials.

Nine percent and four percent of the judges in bench trials offer opinions during pretrials very often, and 34% and 23% offer opinions once in a while during civil and criminal bench trials, while 41% and 42% never offer opinions in each form of bench trials. This is to be contrasted with 25% and 10% very often offering opinions during jury trials, civil and criminal, and 34% and 23% offering opinions once in a while in civil and jury trials. The percentage that never offer opinions in civil and criminal jury trials is 10% and 23%.

The attorney response verified a reluctance to offer opinions by judges in substantive pretrial proceedings in bench trials with 43% reporting judges not offering opinions in civil bench trials, while they reported 0% never offered an opinion about the case in jury trials.

5) Commentators such as Doran, Jackson and Siegel are very concerned about the judge deciding motions that contain prejudicial, otherwise excluded information as a prelude to a bench trial because it could either prejudice the judge or cause the defendant discomfort in that regard. The foregoing statistics confirm that the exposure to inadmissible prejudicial material likely occurs.

In summary it is very likely based on the survey that an event which could expose the trial judge to inadmissible prejudicial material occurs with great frequency the pretrial phase before the commencement of bench trials. In criminal bench trials one half of the judges decide motions with prejudicial material very frequently, and once in a while, 21% of the time. It could be postulated that this is another subtle contributing factor that deters the choice of a bench trial as a mode of trial, and that having a judge who is not aware of the prejudicial information try the case in a non-jury mode would offer greater comfort to the defendant.

H. Do trial judges apply the rules in a bench trial in the same manner as do in a jury trial?

1. Findings

For all three questions – rules of evidence, testimonial hearsay, and documentary hearsay – the attorneys and judges differed significantly in their responses. For all three questions, attorneys said trial judges do not apply the rules the same way in a bench trial,

while judges said they did.[911] Moreover lawyers did not report a strict application of the rules of evidence generally.

2. Analysis

While there was discussion above that these findings may effect the choice of the mode of trial, this section will consider the other main question raised by apparent unequal application of the rules of evidence between judge and jury trials, which is how that difference impacts upon the fairness of the process creating the possibility that the different application of the rules can cause different outcomes applying the same facts to each mode of trial.

Given the different applications of evidence in bench versus jury trials, the survey finding suggests that if each mode of trial tried the exact same fact pattern, the trier of fact would weigh different facts in reaching a verdict. The spectre of such a potential inconsistency raises interesting ethical and practical problems for attorneys or barristers in counseling the defendant who has a mode of trial choice and poses a more substantive dilemma for any legal system which would impose a bench trial on that defendant. At minimum the choice of a bench trial by client with counsel should not occur without the client being apprised of this uncertainty. And this very finding by definition makes a choice of mode of trial not just a tactical decision, it also creates an evidentiary pattern for the case that could seriously impact the outcome. The results also raise a cautionary flag for advocates of judge only trials in certain serious fraud cases in England and Wales. If

[911] All differences were significant at the .001 level.

proper steps are not taken to ensure that the compelling of a bench trial does not mean a different evidentiary standard than a jury trial, that difference could create a miscarriage that might be asserted before the European Court of Human rights.

Such an evidentiary distinction between modes of trial could also inspire a loss of public confidence, for example, in a case where co-defendants are severed, tried separately by different modes of trial with different outcomes perhaps based on different evidence. Moreover if fundamental due process is an overriding objective, shouldn't the parties subject to one mode of trial or the other have clearly defined rules of evidence so that if there is to be a different standard for bench trials, i.e., a suspension of hearsay for example, this is based on a published and notorious rule applicable to all bench trials and not the result of a subjective decision made by one judge which might be quite different from the decision of another judge in a comparable case?

The evidence that there is the disparity in terms of attorney and judges' opinions regarding application of evidentiary rules in bench as compared to jury trials well demonstrated in the survey result.

a) THE RULES OF EVIDENCE ARE THE SAME IN BENCH AS IN JURY TRIALS:

	Judges	Lawyers
Yes	60%	12%
No	35%	29%

Don't know	5%	9%

b) THE RULES OF TESTIMONIAL HEARSAY ARE THE SAME IN BENCH AND JURY TRIALS.

	Judges	Lawyers
Yes	54%	13%
No	40%	77%
Don't know	6%	10%

c) THE RULES OF DOCUMENT HEARSAY ARE APPLIED THE SAME IN BENCH AND JURY TRIALS.

	Judges	Lawyers
Yes	66%	22%
No	30%	70%
Don't know	4%	8%

The foregoing must be considered in conjunction with the general impression expressed by attorneys in the survey that the judiciary is not vigorously applying the existing rules of evidence. For example with regard to the application of Daubert or Frye, the over half of the attorneys, 67%, felt that the court applied those rules in a far less than strict application. Better than one-half of the attorneys felt the judiciary applied the rules of testimonial hearsay fairly strictly, but that same percentage was reversed with regard to the application of documentary hearsay.

I. Agreement with Juries' Verdicts

1. Findings

The judges answering the relevant questions agreed with verdicts in all jury trials, be it civil or criminal over 75% of the time, 89% and 77%, respectively. Over 50% of the attorneys agreed over 75% of the time with bench verdicts and regarding jury verdicts, 58% of the attorneys agreed with jury verdicts over 75% of the time, and 22% of the attorneys agreed with jury verdicts50% of the time.

2. Analysis

Even more telling is the fact that 78% of the judges responding agreed with jury verdicts in complex criminal cases 76% to 100% of the time, 17% of the judges agreed with juries in complex criminal cases 50% of the time; 58% of the judges agreed with complex civil jury verdicts 75% to 100% of the time; 33% agreed 51 to 75% of the time with complex civil verdicts. The foregoing is fully consistent with earlier noted judge/jury agreement studies.

IV. Conclusion

As noted immediately above the judges surveyed gave juries a resounding vote of confidence, particularly in complex cases. Bench trials on the other hand were rarely considered.

The survey results strongly suggest that both judges and attorneys believe that the personality and identity of the judge strongly influences mode of trial choices. While evidentiary factors are not rated as significant factors in the mode of trial choice, there is a difference in the application of the rules of evidence between and bench and jury trials. It is therefore inferred that the propensity of the individual judge regarding the enforcement of rules of evidence is built into the consideration of mode of trial decision. Case complexity is an important factor in the selection of mode of trial with attorneys weighing that factor more heavily toward selecting a bench trial. Both judges and attorneys agree that the mode of trial decision favors the jury when seeking sympathy and favors the judge when the client is unsympathetic.

Of likely greater concern to policy makers is the clear indication that bench trials take on a different flavour from jury trials. Pretrial the judge as the trier of fact is potentially exposed to prejudicial inadmissible information in reviewing the case file, in hearing pretrial motions which includes potentially inadmissible information, and in engaging in pretrial settlement discussions. Therefore, the judges are exposed to more information, some of it prejudicial, as the trier of fact in a bench trial than the jury would hear. By substantial percentages the judges say that they read the file (which can contain inadmissible information) in pretrials discussing the substantive merits of the case and offer opinions about the case, even though they are to be the trier of fact.

During the trial the rules of evidence are not tightly applied and while the judges believe that they are generally applying the rules comparably in bench and jury trials, the lawyers

think the rules are applied differently. Judges ask far more questions in bench trials than they ask in jury trials. Expert jurors could jade outcomes in jury trials as both judges and lawyers felt that their presence impacted outcome.

It is quite clear that the bench trial in New York State has a substantially different character than the jury trial. For example, while the attorney sample contends that judges apply rules of evidence different in a bench trial than in jury trials, the judges by 60% opine they apply the rules the same in both venues. Thirty-five percent of the judges surveyed say they apply different rules in bench trials. Particularly as it pertains to testimonial hearsay, 54% of the judges say they apply the same rules, 4-5 say they do not.

Of the judges answering the question, 57% of the judges felt application of the rules of evidence in criminal cases was somewhat to very important, 63% in the decision in civil cases, against a bench trial.

The bench trial is perhaps under utilized in New York State even though the defendant may select it. The reasons boil down to discomfort with one trier of fact based on existing rules that give the judge great latitude and discretion. This concern trumps the sense that a bench trial could be a good choice in complex cases. For example, Chapter 6(D) demonstrates that presently corporations do not choose bench trials in New York State, based on the survey we can postulate that concerns about the identity of the judge and consequently how a bench trial would be conducted drive this concern.

The differences in the application of the basic rules of evidence as reported in this survey indicate fairness issues when comparing the modes of trial. Mandating a bench trial in a criminal case would pose a risk to the integrity of the process given the existing rules in New York State. The presence of expert jurors on panels poses a potential threat to the deliberative process that requires greater exploration.

CHAPTER 9

JUDICIAL PERSPECTIVES ON THE CONDUCT OF TRIALS IN ENGAND AND WALES WITH EMPHASIS ON COMPLEX AND SERIOUS FRAUDS

I. Introduction

Since Lord Roskill declared in 1986 that "the most complex of frauds cases will exceed the limits of comprehension of members of a jury",[912] the role of the jury has been the object of ongoing debate. Even though a more nuanced view of the jury's function in serious frauds cases was presented by Michael Levi in 1993,[913] Lord Justice Auld in his review of the criminal courts recommended in 2002 that serious fraud cases be tried by judge with lay members or upon the choice of the defendant by judge alone.[914]

More recently Sally Lloyd-Bostock has provided an analysis of the jury's understanding of and opinions about the failed complex fraud trial known as the Jubilee Line case.[915]

---

[912] Roskill Committee, [1986] Frauds Trials Committee Report, p. 142; Miriam Peck [23 Nov., 2006] The Frauds (Trials Without a Jury) Bill 2006-07, Research Paper 06/57 Home Affairs Section, House of Commons Library, 23 Nov. 2006, p. 10:

> "The majority of the Fraud Trials Committee appointed in 1983, and chaired by Lord Roskill, recommended that serious and complex frauds cases should be tried by a Special Frauds Trials Tribunal consisting of a judge and a small number of lay members, instead of a jury."

[913] Levi, M. (1993) *The Investigation, Prosecution and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study No. 14, Home Office, London.

[914] Review of the Criminal Courts of England and Wales by the Right Honourable Lord Justice Auld, [September 2002] http:/www.criminal-courts-review.org.uk/ccr-00.htm, p. 282; Para. 4.31.

[915] Sally Lloyd-Bostock, [2007] T*he Jubilee Line Jurors: Does their Experience Strengthen the Argument for Judge-only Trials in Long and Complex Cases?* Crim L. R. 255.

In the ongoing parliamentary debate in England and Wales regarding the role of the jury in the conduct of serious fraud trials, the judges who manage and try these cases, constrained both by law and custom, have not provided significant public comment. This chapter will explore the judicial perspective on the role of the English jury in complex fraud cases and a judicial view of the perceived risks and benefits of judge only trials.

Even though trial by jury has existed for hundreds of years, judges were first utilized in 1966 as a source to gauge the reliability of jury verdicts when American legal scholars Harry Kalven, Jr., and Hans Zeisel introduced judge/jury agreement as a comparator to weigh jury function.[916] Their study found over a seventy percent rate of agreement in jury trials, comparing the opinion of the presiding judges of each trial with the actual jury verdict in over 4,000 American trials studied.[917] That percentage of agreement was recently ratified by the work of Eisenberg, et al, who reported an over seventy percent rate of concurrence between judge and jury in over 300 trials venued in four major urban centers in the U.S.A.[918]

Although the present law of England and Wales renders it virtually impossible to duplicate either study, there is, however, a substantial body of work in England and

[916] The American Jury (Boston, Little, Brown, 1966)
[917] *Id.*, 58
[918] Theodore Eisenberg, Paula L. Hannaford-Azor, Valarie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab and Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisels "The American Jury"*, 2 Journal of Empirical Legal Studies 171, 173 (2005)

Wales regarding jury reliability.[919] Little of the work assembled reflects the judicial viewpoint regarding the conduct of serious fraud trials. It is possible that such an effort would be of probative value to the members of Parliament enmeshed in the present debate regarding the judicial imposition of non-jury trials in serious fraud cases.[920] This chapter and the research reported herein is a limited attempt to grossly follow Kalven and Zeisel's concept by interviewing a small sample of England and Wales judges who are authorized (ticketed) to try serious fraud cases to obtain their views about jury function in serious fraud trials and related issues.

Detailed interviews were conducted with nine sitting judges who both hold serious fraud tickets and have actual serious fraud litigation experience both as a barrister and as a judge. All nine judges expressed strong support for juries, voicing both a high level of agreement with jury verdicts, and a firm belief that juries have the capacity to understand properly litigated complex fraud cases. Each judge interviewed also voiced his principled belief that trial by jury should continue in all serious fraud cases. Many of the judges expressed significant concerns about the actual and perceived fairness of judge only trials.

---

[919] Penny Darbyshire, Andy Maughn & Angus Stewart, *What Can the English legal System Learn from Jury Research Published up to 2001?*, Kingston Business School/Kingston Law School, Occasional Paper Series 49, 45-62 (2002).

[920] This reference is to Bill 6 of 2006-07 (The Fraud Trials Without a Jury) Bill 2006-07 which is pending but as of this writing on March 20, 2007, the House of Lords voted to delay the second reading of the Bill for six months. *See, Peers Wreck No-Jury Fraud Trial Bid,* [2/30/07], The Guardian, http//wwwguardiacouk.

II. Selection of the Judges Interviewed/Overview

Permission was received from Lord Justice Thomas, Presiding Justice of England and Wales, to survey all of the judges who had tried a serious fraud case prosecuted by the Serious Fraud Office either to a verdict or a judicial dismissal for a recent randomly selected year.[921] The only condition imposed was the requirement that the survey be in interview form with loosely worded topics rather than questionnaires. The Presiding Justice recommended several additional names for interview. Nine of the eleven judges identified from both sources were interviewed (one was deceased and the other declined).

All of the interviews but one took place from March 15, 2007 through March 23, 2007, the last interview occurred on April 19, 2007. By way of geographic distribution, the judges are chambered as follows: 1 in Leeds, 2 in Bristol, 3 in Southwark, 1 in Birmingham, 1 in Kingston, and 1 in Sheffield. Three of the Judges are QCs.

Two of the interviewed judges have for years presided over a docket of mostly serious fraud cases, each having tried over twenty serious fraud cases to a conclusion.[922] Another interviewee described those veteran judges as "moving seamlessly from case to case", as compared with the experience of several of the interviewed Judges having tried three to six lengthy complex serious fraud cases. As one judge noted, while six complex serious

[921] The year will not be published as the author has agreed to maintain the anonymity of the judges as a condition of their cooperation with this study.

[922] Serious Fraud as used in this thesis will rely upon the general description given in the Control and Management of Heavy Fraud and Other Complex Criminal Cases – A Protocol Issued by the Lord Chief Justice of England and Wales, 22 March 2005, summarized as a case that involves fraud or other crimes which could result in a complex trial, that is a trial that will require more than eight weeks to try and thus the protocol should be followed "in all cases estimated to last more than four weeks", as well as in any case prosecuted by the Serious Fraud Office or the fraud prosecutors of the Crown Prosecution Service London.

fraud trials may not seem impressive, it constitutes collectively many weeks of pretrial management hearings and many months of trial time.

The nine judges will be identified by number. They are quoted at length because a main purpose of this chapter is to offer the opinions of trial judges about serious fraud trials.

The agreement of the judges with jury verdicts rendered in their court and their impressions of jury comprehension shall be reviewed. The chapter will explore the role of advocacy in obtaining jury comprehension and as it affects trial length. Judicial concern about fairness in judge only trials both during the pretrial phase and in the actual trial will be examined. Opinions are offered about the application of the rules of evidence in both modes of trial, the judge's view of plea bargaining and selection of the mode of trial is also examined. The judges will, in summary, give their view on certain of the major issues impacting upon serious fraud and other complex trials.

The interviews examined judges' opinions of proposed legislation to permit some serious fraud cases to be tried by judge only, both pursuant to the Criminal Justice Act 2003 and the present legislation pending before parliament.[923]

The interviews also examined the effect of various administrative protocols on issues salient to serious fraud trials: jury comprehension, trial length, and pretrial judicial

[923] Criminal Justice Act 2003, §43; Bill 6 of 2006-07 (The Frauds Trials Without a Jury) Bill 2006-07.

decision making such as the reduction of indictments (pruning); the reorganizing of indictments into several trials; and the impact of rules requiring case statements.[924]

The Protocol promulgated by the Lord Chief Justice in 2005 requires case management hearings, obligates the advocates to justify the proposed length of the trial, encourages judicial pruning of indictments, requires evidence to be weighed pretrial with extensive agreed upon facts and obligates both sides to give detailed case statements, exchange of expert disclosure and presentation of core bundles of documents.[925]

III. Judicial Agreement with the Jury in Serious Fraud Cases

The interviews were conducted in the actual shadow of the 2007 parliamentary debate about trial without jury in serious fraud cases.[926] Permeating every interview was the strong belief expressed by each of the judges that trial by jury was entirely appropriate in serious fraud cases and that trial by judge should not replace trial by jury. The judges unanimously voiced their faith in and commitment to the jury system. The common rational of the judges interviewed was that juries were usually able to understand a complex fraud case upon the completion of the trial, explaining that usually the complexity of a serious fraud case gradually evaporates as the trial progresses when the proof is competently and carefully presented. They further suggest a longer trial can

---

[924] Control and Management of Heavy Fraud and other Complex Criminal Cases, A Protocol Issued by the Lord Chief Justice of England and Wales (The Protocol) [2005] (All Eu Er 10 386 (MAR),; Protocol for the Control and Management of Heavy Fraud and Complex Criminal Cases, http://www.judiciary.gov.uk/docs/controlandmanagementofheavyfraudandothercomplexcriminalcases1803.pdf.; Criminal Procedure and Investigations Act 1996, §28 to 38.

[925] *Id.*

[926] Bill 5 of 2006-07, *supra* note 924.

sometimes give jurors a greater understanding of the facts. Finally each judge expressed a high rate of agreement with juries in the cases they have presided over.

Judge No. 1:

> "I have a great faith in the jury system generally, occasionally something can go wrong but until somebody has a better idea and nobody has to date, I would use the jury in all cases except in the most complex fraud case.
>
> I agree with the decisions of most juries. I have been surprised less often by the jury's verdict in long cases than perhaps in shorter cases. I agree with the Jury 70% of the time or even more in complex cases.
>
> There are very few fraud cases that are so complex that he or she (jurors) cannot understand it... There's going to be one or two, but even then I think we will still need a jury."

Judge No. 2:

> "I have agreed with juries in all of my serious frauds trials.
>
> In longer trials the verdict is more accurate.
>
> I am far more likely to agree with juries in complex fraud cases than I am in sex cases.
>
> In fraud trials the verdicts are frequently a mixed bag, the jury finding on some indictments and not on others. I am a strong supporter of juries in complex fraud cases.
>
> Generally I agree with juries in other cases. Over the years (12 years experience on the bench) I can count on one hand the number of cases in which I think the jury got it wrong.
>
> In serious fraud cases jurors are able to handle the concepts.
>
> I am aware of the notion that these cases are far too complex for a jury to understand. If the case has been properly managed from the outset and the result is that a

relatively clear and simple trial is going to take place at the end of the day when all of the elements have been heard, the issue to be heard is no more complex than your rather average case wherein the jurors are making judgments about people's intentions, states of mind, and whether what they are doing by standard of ordinary people are acts that are honest or dishonest. I always say to a jury don't be overwhelmed by it, ..., it may seem daunting by the sheer volume of material but by the end of the trial it will be fairly clear to you what you have to decide, and at the end of it when you are to consider your verdict, you will not be in any doubt as to what the question is ..."

Judge No. 3:

"I agree with jury in the great majority of cases and when I don't agree, I usually understand their verdict. I might not, where there are a number of defendants, agree with a complete verdict."

Judge No. 4:

"I am a traditionalist and I don't want to lose the trial by jury system.

I have seen both at the bar and as a judge, cases in which the jury has trouble grasping (the facts) and it has been difficult for the advocates and the judge to communicate those issues to them clearly.

Juries can find it difficult to focus on the issues in a frauds trial and understand if it is a heavy documents or an accounting case...

It's hard over months to retain the knowledge and focus on the issues.

Some of these cases can fail because the jury cannot understand the issues.

On the whole we can trust them to do what we ask them to do.

Most of them work on cases conscientiously.

My overall impression is that juries want to do the right thing...

I think on balance I favor retaining the jury system across the board.

I trust the jury system. I agree with jury verdicts most of the time, but there are surprises."

Judge No. 5:

"I view the jury as the best measurement of truth or dishonesty. It is right that the jury should remain and I feel that very strongly. The guardian of the notion of dishonest or not is the jury."[927]

Most frauds trials at the end of the day, no matter how complicated you allow them to become, are based on documents not in dispute and the issue very solidly comes down to an inference to be drawn about the defendants, honesty or no dishonesty and whether the case has been proven or not proven.

I have very rarely believed that someone has been acquitted undeservedly within the context of what was the case against him in an adversarial system.

I have never come across any case ... so difficult that the point has not been shown at the end of the trial."

Judge No. 6:

"I favor retention of trial by jury.

I do not have any complaints about jury outcomes before me.

I agree with the serious frauds verdicts I have taken."

Judge No. 7:

"I do not detect a lack of understanding from observing jurors during serious fraud cases. By the end of a serious fraud trial it is apparent that they understand the case.

---

[927] Judge no. 5.

I have not yet had a trial where the jury did not understand the issues and I have always understood the jury's verdict, even if I did not agree with it.

To paraphrase a Heineken Beer advertisement, juries get to the parts that logic can't reach and they do it with an intuitive understanding.

I agree with jury verdicts most of the time, and agree with juries more often in complex cases."

Judge No. 8:

"In big cases, I am seldom in disagreement with the jury although overall there are 1 or 2 defendants I wouldn't have let go in multiple defendant cases.

In many ways serious fraud cases are not a lot different from certain sex cases in terms of complexity.

I have confidence that juries generally understand most if not all complex serious fraud cases.

I have no reason to doubt that juries understand the issues in serious fraud cases – which can quite often be easily understood by the completion of the trial.

Fundamentally we are talking about honesty and dishonesty. That's very well suited to the jury trial process."

Judge No. 9:

"I haven't a shred of a doubt about that ... (the jury's ability to understand serious fraud cases). There is absolutely no reason on earth why a jury ... could not try a frauds case, it is simply a question of how well prosecuted or presented that case may be

It really does fall upon those bringing the claim to be very disciplined and quite incisive in what it is they think they are alleging and to confine themselves to the absolutely critical points and keep a tight control over the documentation ..."

The judges indicated that they are rarely surprised by a verdict. For example, one of the judge's interviewed stated that there were only two times when he was "slightly inwardly surprised" - in one serious fraud case it was because of the rapidity of the verdict and in another trial it was because the jury convicted on all counts when there was room for possible compromise – but the judge quickly noted that he felt that in each case the jury had a sound basis for its verdict.[928]

IV. Judicial Opinions about Jury Comprehension

Not only is there a substantial agreement with the jury in serious frauds cases, there is also a strong judicial consensus that juries have a reasonable comprehension of these cases. The judges interviewed believe that juries engage in informed and relatively sophisticated decision making, acquitting certain Defendants and convicting others. Individual judges stated that while they might dispute certain of the individual acquittals, the acquittals were understandable based on the proof in the case. One judge opined that in certain of the acquittals he felt the jury was expressing its independence and collective individuality.[929]

Many of the judges offered objective bases for their favorable opinions about jury understanding, distinct from the observation by the judge of jury reactions during the trial. For example, regarding questions sent to the judge by the jury during deliberations, it was observed that juror analysis can be favorably inferred when compared to the proof and the ultimate verdict:

---

[928] Judge no. 6.
[929] Judge no. 5.

> "You can tell from the questions how they are approaching it. You can sometimes tell from the questions which order of the count they are going through thematically."[930]

Several of the judges indicated that the specifics of the verdict could also be suggestive of jury comprehension:

> "The propensity of many juries in multiple defendant cases is to convict some defendants and acquit others, thereby suggesting a discerning reasoning process by the jury that is generally understandable to the trial judge who heard the same facts. It does suggest some sort of analysis ..."[931]

> "You can tell from the questions (the extent of) their understanding – the verdicts also reveal it."[932]

An analysis of the annual reports of the Serious Fraud Office offers support for the judges' opinions in that of nineteen trials to a verdict with more than one defendant from 2003 to 2006, there were eight mixed verdicts in which there were both convictions and acquittals of certain defendants in the same case. While it is possible that the Serious Fraud Office has overcharged certain defendants, it remains a positive for juries that they are able to discern such a flaw in the indictments and distinguish between indictments. The analysis also assumes that there is no higher rate of cutthroat defenses (defendants blaming each other) in serious fraud trials as compared to other crimes. (This is an area that will require further research). That the jury would by verdict find some co-defendants guilty and acquit others objectively addresses the concerns of the former

[930] Judge no. 7.
[931] Judge no. 4.
[932] Judge no. 7.

Master of the Rolls, Lord Donaldson of Lymington, who argued during the 2003 House of Lords Debate on the Criminal Justice Act 2003 that the eighty-six percent

conviction rate reported in fraud trials could be an indication that juries are so confused that they are blindly convicting in serious fraud trials:

> "It is said that juries are wholly suitable for such trials because the conviction rate is 86 percent. That figure frightens me... ...I wonder... whether the jury simply does not understand and comes to the conclusion in some cases that people would not have been charged if they had not been guilty."[933]

Lord Donaldson's concern that jury confusion weighs toward verdicts in favor of the prosecution was likewise not confirmed by post trial interviews with the Jubilee Line case jurors who demonstrated sound jury comprehension. The Jubilee Line jurors "were adamant that the jury had a very good understanding of the evidence, some commenting that it was not all that difficult" and the post trial interviews conducted six months after the trial's collapse were reported as demonstrating that a number of the jurors had a solid understanding of the facts.[934]

---

[933] Miriam Peck, (23 Nov. 2006) The Frauds (Trials Without a Jury) Bill 2006-07, Bill 6 of 2006-07, Research Paper 06/57, 19, (quoting H.L. Debates, 15 July 2003 C 793-4). The conviction rate of fraudsters of 86% is introduced on 15 July, 2003 in the debate by Baroness Kennedy of the Shaws and by Lord Thomas of Gresford and without a source relied upon for that percentage. It is an assumed fact that permeates the debate.

[934] Sally Lloyd-Bostock, *The Jubilee Line Jurors, supra* note 509.

There is other objective support for the judges' opinions. The most persuasive is a trial simulation study utilizing mock jurors which evaluated jury comprehension and competence in a complex trial which concluded as follows about jury compliance:

> "We estimate that a majority of the participants in our studies – around four out of five – may be regarded as sufficiently competent to serve on a major fraud trial".[935]

V. Jury Comprehension Correlates with Competent Advocacy

The judges have a difference of opinion about juror verdict reliability in non-complex cases as compared to complex cases. Several of the judges opined that jurors actually performed better in longer more complex cases while others did not perceive a difference in performance. Case organization may be the distinguishing factor in jury performance. Matthews, et al., found in the survey of jurors in all types of cases that trial organization and proof presentation are key to jury comprehension.[936]

Many of the judges observed that the quality of case preparation and trial advocacy are both essential to juror understanding:

> "The problem is the competence of the prosecution in cases where juries don't understand, not the competence of the jury."[937]

---

[935] T.M. Honess, M. Levi and M. Charman [1998] *Juror Competence in Processing Complex Information: Implications from A Simulation of the Maxwell Trial*, Crim. L.R., 763-775.
[936] R. Mathews, L. Hancock and D. Briggs [2004] *Jurors Perceptions, Understanding, Confidence, and Satisfaction in the Jury System – A Study in Six Courts*, Research and Development Directorate of the Home Office, Home Office Outline Report No. 05/04, p. 4..
[937] Judge no. 6.

> "Serious fraud cases usually come down to the issue of honesty or dishonesty and if the case is simply and clearly presented the jury can understand what they have to decide. At the end of the day you have got to carry your jury with you, so you must concentrate on what really matters so they don't wander off."[938]

One famous example referenced by several judges and reported in the literature is the convoluted opening statement for the prosecution in the Maxwell case in which the prosecution gave an impossible explanation of a limited liability company that would confuse a law student much less a juror.[939] The Jubilee Line case was also generally referenced by the judges as a possible example of management problems; however each judge noted that their impression was not based on actual involvement.

The subsequent investigation into the Jubilee Line case by the Inspector General of the Crown Prosecution Service confirms the impression widely held by the judges that the size and subject matter of the case created managerial challenges that could have been addressed so that the collapse was averted and the case was rather concluded by a verdict. The jury was exonerated from any responsibility for the trial's collapse:

> "And that the jury had acquitted itself in a thorough and conscientious manner, having not contributed in any way to the inconclusive outcome".[940]

---

[938] Judge no. 1.
[939] T.M. Honess, M. Levi and E.A. Charman [2003] *Juror Competence In Serious Frauds Since Roskill: A Research Based Assessment*, Journal of Financial Crime, 17, 27, FN 38.
[940] Stephen Wooler [2006] Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case (HM Crown Prosecutions Service Inspectorate (HMCPS1), Executive Summary at 2, 6.

VI. Judge Only Trials Are Not Favoured

In stark contrast to favouring the use of juries in serious fraud cases, the judicial interviews yielded no support for judge only trials as a replacement for juries. The judges' views were similar to those expressed by the Jubilee Line jurors, favouring the preservation of the jury system, and disfavouring judge only trials as a substitute.[941]

> "It seems to me that it is far better to be judged by twelve of your peers than one judge. That is a right I believe we should maintain."[942]

The opinions of the judges ranged from the notion that judges are simply unable to fairly engage in bench trials (No. 3); to the belief that judges are capable of fairly serving as the trier of fact, but the jury should not be supplanted (No. 5); to the opinion that the jury should decide guilt or innocence and the judge should determine the extent of the fraud (No. 1).

> "I would be wary of trying a fraud case on my own (without a jury).
>
> I would be concerned in Judge only trials that Judges would become hardened by their experience generally.
>
> I sit uneasily with the idea that I am the sole judge of fact in these circumstances (Serious Fraud cases)."[943]

It is a prevailing view that the very nature of a judge alone trial creates an unsatisfactory pretrial and courtroom environment and that the perceived primary advantages of a judge

---

[941] Sally Lloyd-Bostock, *The Jubilee Line Jurors supra* note 509, at 270.
[942] Judge no. 4.
[943] Judge no. 1.

only trial which are a more brief trial duration and an avoidance of indictment pruning are unlikely to happen in reality.

VII. Trial Brevity and Judge Only Trials

The judges were almost evenly divided regarding the premise that a serious fraud bench trial would take less trial time and be more efficient than trial by jury.

> "The only advantage that I can see to judge only trials is that they may be shorter, and as a consequence, less expensive."[944]

This was representative of the view of those judges who thought bench trials would be more brief.

By contrast, several of the other judges with extensive experience in serious fraud litigation opined to the contrary projecting that non-jury trials would be as long as jury trials because the prosecution would pursue theories and indictments before a judge alone that would otherwise be pruned for a jury.[945] They reasoned that the judge as the trier of fact would inherit complexities that the jury would be spared, thereby lengthening the judge only trial.

> "But that advantage may be lost because there may be a tendency by the prosecutors to pass the buck and put boxes of materials and extra charges before the Judge because he would be more likely to cope with the material in a way they wouldn't think the jury would and the reality then is that is that the trial may be longer than it would have been with a jury."[946]

---

[944] Judge no. 9.
[945] Judges nos. 3, 7., and 9.
[946] Judge no. 7.

Those interviewed who felt that judge only trials would be more brief argued that case management hearings could limit the scope of bench trials because initially expansive indictments would be pruned comparable to the process in jury trials.[947] This view undercuts the argument of Lord Donaldson that the full magnitude of alleged criminality would be heard at a bench trial as opposed to a jury trial.[948]

The judges opine that trial length through proper management is a combined function of the judge and advocates (primarily the prosecution) regardless of the mode of trial. They further believe that pruning and other trial management techniques do not reduce defendant culpability, but rather are an integral part of proper trial preparation by the advocates:

> "There are three words I would use: focused, incisive and disciplined. They are the watchwords of any litigation and after all a criminal prosecution is just a form of litigation.
>
> I do respectfully disagree (with Lord Donaldson's argument) because the fact of the matter is a fraud case no matter what form it takes involves a very dry, simple issue - namely honesty - and I can't think of a tribunal better qualified to determine if someone is honest or dishonest than the jury.
>
> It's a misapprehension to think that a Judge alone would give a shorter and cheaper trial. What they (various police and prosecutors) often say and I think quite wrongly is that they have to undercharge because they can't present to the Court, the evidence properly to reflect the full magnitude of the criminality and in effect whoever is convicted isn't sentenced properly because they couldn't go as far as they

[947] Judge nos. 4, 5, 7.
[948] Judge no. 4.

> wished to make the thing manageable at all. That is a view point I simply profoundly disagree with. I frankly have conducted (as an advocate in private practice in civil cases) for trial or arbitration far larger cases than any criminal fraud prosecution presented in English criminal courts. And of course, the way you do these things is to have a sufficient team of lawyers and sufficient quality. That however is a difficulty when you start involving the public purse."[949]

VIII. Concern about the Bench Trial Environment – Intra Trial Prejudice

Several of the judges interviewed expressed a strongly held concern that the judge only trial would adversely challenge or alter the dynamic of the judge's role during the trial. For example, if a judge asks a question or several questions during a judge only trial (thereby exercising the same right enjoyed by the jury) that could consequently alter the course of the trial because unlike a question posed by a juror, a query from the judge comes from the sole trier of fact rather than one of twelve:

> "I fear that when approaching the important issue of non-jury trials, far too little weight (if any) has been given to the fact that we operate under an adversarial system in which the parties, and not the judge, are regarded as responsible for laying the evidence before the Court. I regard this as being of fundamental importance to the issue, for to give the judge the great responsibility of fact-finding in very substantial (often high-profile) cases will (to an even greater degree than occurs in some civil cases) be accompanied by an urge on his part to ensure that he does arrive at a safe (true) verdict, with which he, at least, will thereafter feel entirely comfortable.
>
> The judge, now also the judge of fact, sees things going wrong and puts them right; or asks an entirely necessary, but thoroughly unwelcome, question and is accused of having made his mind up; or spots damaging evidence against a defendant, which has not hitherto formed the basis

[949] Judge no. 9.

> of the case against him; or for good reason asks to hear the evidence of a witness who both sides have decided not to call. These might not be seen as severe difficulties in the conduct of a civil action or in an inquisitorial system, but in a non-jury criminal trial conducted under our adversarial system they surely would be."[950]

The same judge further reasoned that after one or two bench trials, judges could unfairly obtain the reputation of favouring the prosecution or the defense (when neither is true) based on the judge's actions in several cases even though the judge was fairly applying the facts and the law as the case was tried before him/her.

Judge No. 6 succinctly labeled bench trials as requiring:

> "Decision making that is very hard work, and it is stressful work, and would impose an additional burden on the Judge ... a burden that would not benefit the system in my view."

Judge No. 8 concurred with Judge No. 6 and Judge No. 3:

> "I'm not keen to do it; I believe it poses an intolerable burden in a big complex trial. It would be tremendously difficult to regulate the advocate's conduct and keep them to the point and compel them to focus on the issues ... when the judge is also sitting in the jury box with the juries hat on, there is a risk that the appearance of bias or prejudgment will result from judicial interventions which will be seen as unfair even though those actions are ordinarily engaged in to manage jury trials. I think its very helpful to keep the two functions separate (judge and jury) not least of all from the perception of the defendant himself and the observer who is looking to see that the trial is being conducted in an even handed way...".[951]

---

[950] Judge no. 3.
[951] Judge no. 8.

Another judge noted that in bench trials in civil cases, judges are far more interactive and participatory. He offered the following analysis of problems associated with bench trials:

> "I am reasonably confident that I could do a good, quick job on a major fraud trial with several caveats. ... I accept that there would be difficulties because with trial management hearings from the early stage, I'm rather stamping my character on the trial which doesn't matter if I can then conduct a fair trial in front of a jury ... if I were then making the decisions during the trial as to truth and lies, I can understand a defendant being unhappy about it if he goes down. On the other hand my experience with Civil Judges in civil fraud is that they are much slower to find fraud than the juries, ...
>
> If judges were to start trying fraud alone they might find more acquittals than the politicians would think."[952]

Holding the same view two other judges expressed concern that Judge only trials could lead to case hardening:

> "Unlike the fresh objective approach each jury brings to a trial, we (Judges) would see what we would believe to be set piece fraud and you see a pattern and shape and it can cause prejudice in a person who has done many cases, whereas it would be looked at with a fresh look by a jury without being in any way naïve about it ... if there is some sort of dishonesty they will see it ... on balance I think a jury is more likely to give a fair verdict than a judge alone but of course no two juries are the same and you could have unfair people on a jury and you can have some judges that were outstandingly fair, so it isn't capable of a black and white answer. I believe because of case hardening that someone who became used to them (fraud cases) would be jaded, that it is more likely that a jury will be fair."[953]
>
> "A risk is that judges doing judge only trials would become a little jaundiced. In a judge only trial in a criminal case, the judge will need to fragment the evidence based on the rules of admissibility and the difficulty with that is that some will begin to worry not just the Defendants, but the

[952] Judge no. 5.
[953] Judge no. 7.

> judges assume as well as whether it is real or just a legal fiction that he is removing from his mind things that he does in fact know that a jury wouldn't know and I think that raises a question not just of justice being done, but being seen to be done."[954]

Of course, district judges and magistrates engage in bench trials all of the time. It is perhaps no coincidence that the conviction rate is higher before these tribunals in either way offenses than before juries. One inference that can be drawn from the conviction rates is that there is some degree of case hardening.[955] On the other hand, studies of judge only Diplock Trials in Northern Ireland have generally suggested that case hardening is not a significant problem.[956]

Another judge, also an advocate of jury trials, felt that management problems in a judge only trial would likely be the same as in a jury trial, but the management of evidence pretrial and intra-trial would be quite different:

> "What would be different (pretrial) is that you could be direct as to the evidence that you would acquire to resolve the issue, you could speed up the process which during the course of the trial you could see the issues and get to them and deal with them better. No one knows what a jury is thinking and everyone dances around the issues so you could deal with evidence using core bundles, read it, get into it on a much quicker scale if you didn't have the jury."[957]

---

[954] Judge no. 9.
[955] J. Vennard, *The Outcome of Contested Trial*" in D. Moxon (ed.) Managing Criminal Justice (1985) at 121; P. Darbyshire, *For the New Lord Chancellor – Some Causes for Concern About Magistrates* [1997] Crim. L. R. 861, at 869.
[956] J. Jackson and S. Doran, Judge Without Jury, Diplock Trials in the Adversary System (Oxford U. Press, 1995); S. Doran and J. Jackson, The Case for Jury Waiver [1997] Crim. L.R. 155.
[957] Judge no. 4.

That judge, with both civil and criminal experience, felt that the criminal bench trial would ultimately mirror the civil bench trial. While he prefers jury trials and advocates for their retention, he believes judges could do a competent and fair job as triers of fact:

> "In the civil trial experience ... part of our function as a judge is to see what the issues are and chip through them. If I see evidence going in that is marginally important or irrelevant or of no assistance ... I will say let's move on ... and I think pretty likely judges would be able to say that in our (criminal) jurisdiction. I don't see it as a particular problem in the jury versus non-jury debate. What I feel as a traditionalist is that it's far better to have a trial by twelve of your peers than by a judge. It seems to me that is an important principle that we ought to maintain."[958]

A judge who also sits in civil cases states:

> "In civil cases I sit alone and the trial is designed to allow me to get to the root of the case quickly. That is a wholly undesirable approach in a criminal case. The jury is a balance against injustice and prejudice which a judge only trial can't ensure."[959]

IX. Concern about the Bench Trial Environment – Potential Judicial Prejudice – Pretrial Rulings and Evidentiary Issues

Many of the judges interviewed made a detailed, reasoned argument against judge only trials because of concerns about the appearance of judicial prejudice derived from managing the case from cradle to grave as contemplated by trial management

---

[958] Judge no. 4.

[959] Judge no. 7. This balancing of course must be compared to the perceived accountability of the professional Judge. "A professional Judge is accountable for his or her decisions much more than a lay trier of fact." John D. Jackson , *Paradoxes of Lay and Professional Decision Making in Common Law Criminal Systems* [2001] 72 Revue Internationale de droit Penal 579, #13 (2001).

protocols.[960] One judge argues that eight instances ordinarily dealt with pretrial (Public interest immunity; abuse hearings; trial management, and severance; Section 78 decisions, balancing relevance and probative value against prejudicial effect; bad character; hearsay; applications to read evidence under Section 116 Criminal Justice Act 2003; confessions) or in any combination thereof:

> "Provides an opportunity for the judge to become privy to a body of evidence which may be very prejudicial to a defendant, and which may compromise his fact finding responsibilities – or at least, will be seen to do so".[961]

While generally the judge will see this information in a jury trial, proposed evidence which is excluded by the judge will not be considered by the jury. In a judge only trial the trier of fact will see the excluded material.

The same judge referenced a paper to the Judicial Standards Board by a past commissioner who identified this as a serious problem to be remedied by recommending that:

> "A judge, who has ruled, pretrial on admissibility in respect of other matters, should withdraw from the trial if he has had sight of material which has been ruled inadmissible".[962]

There is some dispute about the circumstances requiring recusal or withdrawal. One judge rejects this option as impractical[963], another judge offers a different view:

---

[960] Protocol for the Control and Management of Heavy Fraud and Complex Criminal Cases, http://www.judiciary.gov.uk/docs/controlandmanagementofheavyfraudandothercomplex criminalcases1803pdf.
[961] Judge no. 3.
[962] Private communication on file with Author.

> "I think the proposition that by reason of his training and experience that a judge is capable of taking on board that which should be taken on board and can put out of his mind that which should not be considered is baloney – how is anybody to put something out of his mind ..."[964]

A third judge views prejudice as unlikely:

> "I do have sufficient confidence that a professional judge can not only exclude evidence which is unreliable or prejudicial and could give reasons for doing so which would eliminate the appearance of prejudice. I cannot say that there would never be a risk of circumstances arising in case management which would be so prejudicial as to require another judge to try the case ... but I can't think of an example."[965]

The problems posed by the creation of the appearance of judicial prejudice caused by pretrial decisions in bench trials and the remedy of recusal from trying any case where the judge has been exposed to prejudicial pretrial material have been raised by respected academic commentators, arguing that judges should not view prejudicial evidence in a pretrial proceeding, exclude it, and then sit as the trier of fact.[966] One judge labeled recusal in such a situation as a "pragmatic practical solution to a principled problem", but offered that such a solution runs contrary to present efforts in serious fraud cases to emulate America's docket or one case, one judge system.[967]

---

[963] Judge no. 3.
[964] Judge no. 6.
[965] Judge no. 7.
[966] Sean Doran, John D. Jackson, Michael L. Siegel [1999], *Rethinking Adversariness in Non-Jury Criminal Trials*, 23 American Journal of Criminal Law 1, 77, FN8.
[967] Judge no. 9.

X. Will There Be Different Evidentiary Standards for Bench Trials? The Impact of the Criminal Justice Act 2003

Evidentiary standards are more relaxed in judge only civil judge trials as compared to criminal jury trials in England and Wales. The judges were asked to project that in the event serious fraud cases were to be tried by judge only, how would the rules of evidence be applied in these trials.

A majority of the judges believed that the rules of evidence would be applied similarly in a bench trial as compared to a jury trial. The judges considered the Criminal Justice Act 2003 as enacting a more permissive standard for admission of evidence in the application of key evidentiary rules such as hearsay, prior bad acts, bad character, and prior convictions. Section 78 of The Police and Criminal Evidence Act, 1984 (Pace) 1984 was referenced by several as providing a balance to the perceived expansion of admissibility, said statute providing that:

> "The Court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the Court that, having regard to all the circumstances ... the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it."

The majority of judges when asked if the rules of evidence would be different in a bench trial as compared to a jury trial stated:

> "I would answer that question different today than I would have several years ago; we have had some very significant changes in the rules of evidence which effectively mean that an awful lot of material will go before a jury today that three years would not have been in the form of prior convictions and reform of the hearsay rule. The (present)

rules are more lax and thus more evidence goes before the jury now than years ago."[968]

"I believe a properly instructed jury is going to take as careful a look at evidence which cannot be cross-examined as a Judge would."[969]

"(Because of the Criminal Justice Act 2003) Juries now get more of the evidence that a judge would get in a bench only trial ... so I think that the difference in a judge alone case and a jury case are very much more narrow than they would have been before the 2003 Act."[970]

"2003 CJA has made a huge difference in approach but I do not see it has done anything but good. It is not causing problems in my view regarding fairness. I have been surprised at the ease with which juries have taken to, for example, the occasions in which bad character has gone in ... now that it has gone in in much broader circumstances, I have not found that it automatically results in convictions ... juries are not over influenced by it."[971]

While most of the judges interviewed did not think that there would be a material difference in the evidentiary standards applied in bench trials from jury trials, the minority view was as follows:[972]

"I think the bench trial evidentiary rules would be different from jury trials. But I'm rather in favor of loosening the grip we maintain on hearsay in jury trials anyway. I think juries find it difficult to understand why they can't hear and understand what we lawyers call hearsay evidence as it is, and I think given careful and proper directions there wouldn't be much danger of any unfairness."[973]

---

[968] Judge no. 2.
[969] Judge no. 5.
[970] Judge no. 7.
[971] Judge no. 8.
[972] Judges no. 4, nos. 6, 7, 8.
[973] Judge no. 8.

For example, several judges expressed the opinion that juries were not impressed by prosecutorial reliance on prior convictions, the judges believing that jurors saw the use of prior convictions as unfair. This contrasts with a more scientific simulation study of mock jurors which concludes that:

> "The results indicate that the information evokes stereotypes of typical criminality, and that caution over revealing a defendant's criminal record is well justified."[974]

A judge opined that the new hearsay rules have helped the prosecution streamline cases, but that case organization and cogency is primarily achieved by the prompt retention of a capable prosecutor with adequate supporting resources to try the case.[975]

Some judges did not think that the changes effectuated by the Criminal Justice Act 2003 altered the conduct of trials despite the fact that it is more permissive:

> "It has not had any great impact in the two years that it has been in effect."[976]

> "CJA 2003 does not ultimately affect outcome of the case."[977]

One judge summarized evidentiary issues in jury versus non-jury trials in civil versus criminal trials as follows:

> "It is trite that to say of someone that he has acted as 'judge and jury' is to accuse him of bias or unfairness. No such accusation is leveled at the judge in civil proceedings, but

[974] Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record; A Simulation Study* [2000], Crim. L.R. 734, 734.
[975] Judge no. 4.
[976] Judge no. 5.
[977] Judge no. 6.

> one can see why: (1) the standard of proof in civil cases is significantly lower, the fact-finding exercise is therefore likely to be simpler, easier to explain and justify, and most importantly, to accept; (2) the public is not normally involved in the same way; and (3) the consequences are of a different order. An adverse finding in a case of serious crime will be loss of liberty, quite possibly for years, with the threat of much more to come in confiscation proceedings.
>
> As it happens I have had the experience of having tried several Q.B. civil cases in which I have had to determine allegations of fraud (one lasted more than six weeks). In these cases, of course, the standard of proof is somewhat higher than the conventional civil standard. I accept without reservation that these trials were easier to conduct than the equivalent criminal trials, in that e.g. concerns about jury availability and the burdens of jury pastoral care were removed, and the strict rules of admissibility were relaxed."[978]

Another judge made a concurring point from a different perspective:

> "I don't want to get too high minded or pompous about it but there would be unease, I think, about hearing and seeing everything and the deciding the cases and then sentencing – the whole thing."[979]

One judge expressed the view that in the hands of the present cadre of judges the more permissive hearsay rules enacted by Criminal Justice Act 2003 will not materially impact upon trial outcomes, but he also feared that the hearsay exceptions pose opportunity for ethically challenged advocates to greatly impact trial outcome.[980] Another Judge agrees that the application of the Criminal Justice Act 2003 evidentiary provisions will be

[978] Judge no. 3.
[979] Judge no. 9.
[980] Judge no. 5.

balanced based on judicial training under the prior law of evidence, but he clearly sees the reforms as favoring the prosecution and reducing defendant's rights.[981]

Several judges noted that it was ironic that Criminal Justice Act 2003 actually places greater faith in juries by giving them more evidence with the duty to weigh it – particularly hearsay.

> "In view of recent changes in the CJA 2003, the jury is presented with a great deal more evidence to take into account than before."[982]

XI. Management Techniques Have Worked

In 1983 Michael Levi observed the trend toward a managerial solution to serious fraud cases, reporting that the abolition of the jury was under consideration in these cases, offering the following explanation:

> It is precisely because fraud is not seen as an ordinary (or even "real") crime that many people can see the abolition of the right to a trial by jury in this sphere as not infringing basic principles of criminal justice.[983]

Managerialism is alive and well presently to such an extent that the judicial role in serious fraud cases may be more like that of the judge in the civil law nations. As reported above, nine England and Wales judges who were certificated to try serious fraud cases reported their support for trial by jury, but also accentuated the importance of trial

---

[981] Judge no. 4.
[982] Judge no. 1, a similar view was expressed by Judge no. 7.
[983] Michael Levi, *Blaming the Jury: Frauds on Trial* [1983] 10 Journal of Law and Society 257, 268.

management by the judge and the quality of advocacy by the barristers in achieving a just and efficient outcome.[984]

The continental system has been extolled as a model of efficiency by common law nation authors such as John Langbein, asserting that the European system of procedure includes judicial control of the investigatory process, control over witnesses both fact and expert, and generally forbidding lawyers to contact witnesses.[985] The Civil Procedure Act in England and Wales in a non-jury trial grant judicial control over both trial duration and expert testimony including permitting the judge to order opposing expert consultation or to retain its own expert, thereby resembling a civil law role for the judge.[986]

The managerial scheme set forth in both the criminal justice rules and a protocol issued by The Lord Chief Justice for the control and management of serious fraud cases may mildly resemble the civil law form of criminal justice. The rules primarily rely upon judicial persuasion to pare indictments, manage witnesses, and control the flow of the case, ceding to the barristers the significant control over the trial in terms of witnesses and the ultimate architecture of the case. Case management conferences offer the parties the opportunity to receive judicial input but the lawyers retain control over their case in all essential respects.

---

[984] Robert F., Julian, *Judicial Perspectives on the Conduct of Serious Fraud Trials* [2007] Crim. L.R. 751.
[985] John H. Langbein, *The German Advantage in Civil Procedure*, 52 University of Chicago Law R. 823 (1985).
[986] Civil Procedure Rules Part 35, Civil Procedure Rules Part 3.

The managerial rules do not alter Mirjan Damaška's description of the judicial role in a jury trial:

> "[The] judge stands at the gate of the fact finding citadel, charged with determining whether information to be passed on to the ultimate fact finder possesses a significant cognitive potential to be admissible. But the trustworthiness of the information's carrier is not his business: That lies in the exclusive province of the revered jury"[987]

The Auld Report embraced the need for more proactive judicial management, ushering in at the commencement of the new century a somewhat different role for the judges charged with trying complex cases such as serious fraud.[988] The Court of Appeal and the managerial judiciary thereafter reorganized case management including assigning the trial judge to the complex case early on and encouraging the judge to actively "manage" the case from cradle to grave.[989]

The Auld report also ushered in changes in the England and Wales jury pool, resulting in legislation eliminating vocational exception for jury service. The report did not advocate granting the defendant a say in the mode of trial and subsequent studies such as the "Fraud Review" have advocated more plea bargaining of serious fraud cases.[990]

---

[987] Mirjan Damaška, Evidence Law Adrift, 56 (1997, New Haven: Yale University Press).
[988] Auld Report, *supra* note 16.
[989] Control and Management of Heavy Fraud and Other Complex Criminal Cases – A Protocol Issued by The Lord Chief Justice of England and Wales [2005] All Eur (D) 386 (Mar). Hereinafter the protocol.
[990] Fraud Review: Final Report, 204-205 (2006).

The judges interviewed unanimously concluded that the management format for complex cases established pursuant to Criminal Justice Rules 2004, Part 3 and the March 2005 protocol has reduced trial length,[991] endorsing the accomplishments of the regimen of managerial changes with the following descriptions of the protocol's effect:

> "We have a pretty effectively rolling bandwagon."[992]
>
> "They have created a change of style and atmosphere".[993]
>
> "Generally the protocols for pretrial direction operate satisfactorily. The primary problem is that if you don't get the cooperation of the parties, there is no effective sanction if the directions are not adhered to."[994]

Given the perceived success achieved in reducing the duration of serious fraud trials, the judges were mystified regarding the present parliamentary efforts to impose judge only trials. One judge noted that Parliament has been unwilling to give the managerial changes a full opportunity to work:

> "Why then, when we are at the beginning of a new era of proper and effective trial management designed to make jury trials in these cases acceptable, are we suddenly to introduce a new system confined exclusively to cases of fraud?"[995]

Every judge interviewed detailed a significant cultural shift in the management of complex cases. The specific procedures implementing that shift are codified by the Lord

---

[991] The Protocol, *supra* note 924.
[992] Judge no. 6.
[993] Judge no. 5.
[994] Judge no. 1.
[995] Judge no. 3

Chief Justice in the protocol have become the normal basis for case management of complex cases.[996] The impact of the protocol is described as follows:

> "It has produced a culture change, a change in attitude both in the judiciary and in the bar not overnight but has made changes that are constructive."[997]

> "While I do not have the protocol quoted at me nor do I quote the protocol very frequently, there is no doubt it has changed trial management to the better."[998]

> "It is not just 'the protocol'. The new criminal procedure rules have promoted better case management ... and has the influence of the Court of Appeal Criminal Division ... and the present Chief Judge of the Court of Appeal, Sir Igor Judge. It is rare for him to miss an opportunity in decisions to comment on the need for improved case management."[999]

Although so-called "cradle to grave" judicial case management is encouraged in the protocol, it is not always achievable in the major urban centers where most of the serious frauds cases are tried.[1000] Scheduling can prevent the judges assigned exclusively to serious fraud trials from trying every case assigned to them when they have lengthy trials, because trial dates frequently overlap, thereby requiring the assignment of some trials to judges who have not managed the case pretrial. In the smaller judicial centers "cradle to grave" management is achieved because each judge will be assigned one or two serious fraud cases a year as the smaller volume of serious fraud cases are evenly divided between the ticketed judges.[1001]

---

[996] The Protocol, *supra* note 924.
[997] Judge no. 9.
[998] Judge no. 5.
[999] Judge no. 6.
[1000] Judge no. 3.
[1001] Judge nos. 1, 4.

Every judge interviewed agreed that the managerial policies articulated in the protocol have reduced the duration of jury trials. The most detailed example was offered by a judge who estimated that his most recent serious fraud trial was shortened from a likely eight week trial to a six week trial to verdict by case management hearings conducted pursuant to the Protocol.[1002] Other judges stated:

> "The protocols have reduced trial time by virtue of the atmosphere they have created – trial time is dramatically reduced. We used to take two to three weeks in serious fraud cases setting the scene so the jury can understand the system - not so presently. We now get to it much more quickly."[1003]

> "They (the rules and protocol) make the case shorter."[1004]

> "As a matter of culture, including the protocols, the trial time in these cases has been greatly, greatly reduced. I think it started with the Blue Arrow case, how could the jury manage a case such as this case and the thinking from then on is that we should better manage these cases ... the protocol reflected that general consensus and sort of further pushed the matter along."[1005]

Other judges were unable to be as precise in terms of the exact amount of time saved by implementing the protocols, apart from a general acknowledgement that the savings are significant:

> "I don't think I can quantify it but there is no doubt in my mind that time is saved."[1006]

A main feature of the case management hearings is an initial effort to evaluate the indictment in terms of the content and the number of defendants. The early involvement

---

[1002] Judge no. 1.
[1003] Judge no. 5.
[1004] Judge no. 4.
[1005] Judge no. 4.
[1006] Judge no. 2.

of the lead prosecutor is essential, as one judge explained, because there is a propensity by the police or the Serious Fraud Office to attempt to try their entire investigation rather than the most provable and readily understandable aspects of the case.[1007] Along with early involvement of the lead prosecutor, adequate resources must be dedicated early on to the investigation and trial in order to properly prosecute a complex case. It is the quality of both the instructed counsel and the team assembled to prepare the prosecution that is essential to well organized successful prosecution:[1008]

> "Few people would say that the Serious Fraud Office has been a resounding and unalloyed success."[1009]

Another judge opined that bench trials, given the present pattern of prosecutions, even with pruning, would likely become longer with time. Bench trials could become a significant management problem as the prosecution would likely place broader theories and more detailed fact situations before the judge than a jury.[1010] Even presently, pruning is a difficult task:

> "In a serious fraud investigation by the Serious Frauds Office, the investigation has gone on frequently for four or five years. So in management hearings you do not generally get to eliminate defendants, but what it is possible to do in the first hearings in terms of managing the case is to set a fairly tight timetable up to a trial date which you set in the first hearing, you put everybody under a responsibility to report to the Court."[1011]

[1007] Judge no. 3.
[1008] Judge no. 9.
[1009] Judge no. 9.
[1010] Judge no. 7.
[1011] Judge no. 2.

The judges interviewed were of the unanimous view that the pretrial hearing process generally improves the trial advocacy by prompting a more organized prosecution case. As veteran advocates as well as trial judges, they view the pretrial hearing process as a useful methodology which usefully requires the prosecution to realistically organize a complicated investigation into a plan for trial. The government acknowledged in its fraud review that trial organization is essential, noting that prosecutorial organizational failures have had adverse consequences:

> "We have concluded that poorly thought out and executed prosecutions, or the unwillingness of the defense to provide properly detailed defenses statement ... or to focus on narrowing issues can and do contribute to delay and waste of resources in some cases."[1012]

The judges use pretrial hearing(s) to define the meat of the proposed charges against the defendant, and achieve cogent indictments. The hearings are not a means to reduce culpability or water down the case against the defendants.

> "You really identify the issues that are going to be tried and all of the agreed facts are scheduled. If the pretrial proceedings are done properly in the trial before the jury is relatively simple because you have got rid of the unnecessary and are really concentrating on what matters – which usually comes down to the big old question of honesty or dishonesty."[1013]

In cases of both multiple indictments and multiple defendants it is a common practice to split the indictments so that the judge can try the fraud in two or three shorter, more

---

[1012] *The Fraud Review – The Final Report*, Legal Secretariat of the Law Officers, July 2006, http://www.lslo.gov.uk/pdf/FraudReview.pdf.
[1013] Judge no. 1.

concise, consecutive trials rather than having one trial with seven to ten defendants.[1014] In a serious fraud case with eighteen defendants, a judge utilized the case management hearings to sever the indictments, trying five consecutive but shorter cases rather than one.[1015] Overall, the multiple trials will in aggregate likely be longer for certain of the defendants and the judge, but each individual trial will be of much shorter duration.[1016]

The mechanics of such a pruning are simple. At the judge's request during the initial case management hearing, the prosecution will be asked to propose a plan to reduce and reorganize the indictments and the defendant into sequential trials. That proposal is reviewed by counsel and a plan for a more compact trial is devised at the subsequent case management hearing.[1017] For example, in multiple defendant cases, if there are one or two main actors who are defendants, he/she will be a defendant at each of these trials.[1018] One judge noted that a guilty verdict against the first group of defendants to be tried frequently results in pleas from the remainder of the defendants.[1019]

Concern was expressed during the Parliamentary debate that the act of pruning potentially diminishes the extent of the culpability of the fraudsters for their acts.[1020] The further argument is that the full magnitude of the fraudster's actions would be triable in a judge-only case, and to do any less would pervert justice. The judges do not hold

---

[1014] Judge no. 2.
[1015] Judge no. 2.
[1016] Judge no. 2.
[1017] Judge no. 6.
[1018] Judge no. 2.
[1019] Judge no. 5.
[1020] Miriam Peck, *supra* note 912, [quoting for example Lord Donaldson H.L. Debates 15 July 2003] C79 304

the view that case management will necessarily result in diminished culpability. A judge described one case management conference in which he negotiated a twenty-five count indictment to nine or ten counts with the understanding that facts regarding the other counts were admissible to show a "similar fact" or "modus operandi". As a result, the alleged culpability of the defendants was in that judge's opinion fully, but coherently set forth for jury evaluation..[1021]

A different judge described the reasoning used in pruning in a case where the indictments were reduced from 35 to 14:

> "Getting more and more criminality doesn't produce enormously longer sentences because of the proportionality principle. If the prosecution says to me that it is the cumulative effects of the counts which make out the case, in other words, it's the circumstances and evidence rather than the number of counts of the indictment, clearly that does raise different issues and I look at that closely. But even then I become a little uneasy because that then is a function of evidence rather than allegation. If it's criminal once, then it is criminal thirty five times. It is not criminal once then it will not be criminal 35 times."[1022]

Not all case management hearings result in pruning. A third judge described a pretrial management hearing immediately before the trial that consumed one week regarding whether the indictment should be split up and tried separately in a multiple defendant serious fraud case. The judge declined to split up the indictment.[1023] This prolonged hearing was the last of a series of management or progression hearings held in sequence

[1021] Judge no. 5.
[1022] Judge no. 9.
[1023] Judge no. 4.

by the judge both to update the court on the trial management process and to deal with other substantive issues that might otherwise lengthen the trial.

The same judge observed that while pretrial management hearings are useful in having the prosecution reduce and manage its case, consequently saving time, the defense is a much more difficult management problem:

> "You can reduce down the evidence, obtain agreement (admissions as to the evidence on agreed facts) as to certain evidence that will be presented to the jury but the procedures are quite toothless in terms of obtaining defense compliance."[1024]

He noted that while issuing fines to the defense for wasted costs is an option for non-compliance with the protocol, it is usually not meaningful in obtaining compliance. He adds that the more harsh remedy of precluding a defendant who does not give full disclosure is not a realistic option.

The value of pretrial management hearings rationally evaluating the evidence, the scope of the indictments, and theories of the defendants' culpabilities is emphasized by the Jubilee Line case. The investigation conducted by Crown Prosecution Service Chief Inspector, Stephen Wooler, describes the prosecution as proceeding at trial on a convoluted conspiracy to defraud theory:

> "The defendants had conspired to obtain confidential claims assessments and other commercially sensitive information from the LUL (London Underground Limited) and used it to advance (their) commercial interests ..." The

[1024] Judge no. 4.

> second count of the indictment, conspiracy to defraud, required the drawing of inference by the jury that the dishonest possession of these documents, and all the surrounding circumstances, raised an inference that the defendants intended to use them to the economic prejudice of LUL."[1025]

This was, according to Mr. Wooler, an unrealistic strategy that should have expected the defense to refute the inference by introducing the contrary actual use of the documents, proving in detail the use of each document in the reimbursement claim process. Although Count 2 was found by the judge before trial to be good in law and that there was a case to answer at the close of the prosecution's proof, the actual prosecution of this count required ten months of trial time because the prosecution encountered overwhelming proof problems. As described by Mr. Wooler, the proof on this count:

> "Came to resemble more the investigation of a case conducted in an adversarial forum that the prosecution and defense of criminal allegation, with the slow rate of progress and frequent interruption that such a process implies".[1026]

The trial management process utilized by each of the interviewed judges fully applying the protocol would likely reduce the risk or the extent of such an evidentiary misadventure. For example, one judge described a serious fraud case assigned to him where the prosecutors brought a 35-count indictment. The original case management hearing as described by the judge was as follows:

> "I told the advocates that I am not prepared to present a 35 count indictment to any jury. The prosecution thereafter came back with a 14 count indictment. I have never ever

[1025] Stephen Wooler, *Executive Summary, supra* note 940.
[1026] *Id.*, . 4.

been impressed by the notion that you can't prune an indictment to a digestible length and not properly reflect the criminality of the case. In the event of a conviction the Judge can then properly sentence."[1027]

Case management hearings are also a forum to establish detailed deadlines, exchanges of information, and organizational efforts as follows:

a) The declaration by the prosecution of its case through a case summary, a case bundle of documents and possibly a mini-opening to be delivered in court during either first case management hearing (or thereafter).[1028]

b) The evidence to be vetted including the introduction of hearsay or bad character evidence, and the reading of evidence in the absence of witnesses.[1029]

> "We try to decide matters of admissibility, if necessary before the date of the trial, to let everyone know in advance what has been admitted into evidence and what has been left out."[1030]

c) The providing of defense statements. Although as noted above there are concerns that defense non-compliance with disclosure and case statements cannot be met with meaningful penalties.[1031] Another judge

---

[1027] Judge no. 9.
[1028] A Model Case Management Order provided to and on file with the Author.
[1029] Judge no. 4 noted that adequate preparation time was required in which the judge reads through the documents "not as if you were to try the case as lead counsel but you have to have a grip of it" in effectively conducting a case management hearing. This is especially important in attempting to resolve disclosure issues "you can't effectively rule on these issues until you have read the case".
[1030] Judge no. 1.
[1031] Judge no. 4.

noted that there really is no effective sanction that can be given for non-cooperation in a criminal case.[1032]

> "Late service (some 18 months after prosecution primary disclosure) of defense case statements delayed access to 3rd Party unused material, raised new disclosure issues for the Judge and delayed the start of the trial."[1033]

This problem was acknowledged by the Government in the 2006 Fraud Review which called for more detailed defense case statements and noted that in a case:

d) The preparation of an agreed statement by way of a background material for the jury.

e) The organizing of notices to admit evidence and formal admissions of fact.

The obvious advantage of agreed upon facts is:

> "The trial is shortened by the identification of what are the real issues the jury has to decide and a written schedule of the facts that are agreed upon."[1034]

However, one judge noted that a downside of agreed upon facts is that:

[1032] Judge no. 9.
[1033] Fraud Review: Final Report, 204-205 (2006).
[1034] Judge no. 1.

> "Too much agreed upon and scheduled can give the jury too little time to understand the case."[1035]

f) The creation of schedules and graphics.

> "The progress of a case is advanced by technology."[1036]

> "In the last long case I tried the electronic presentation of documents saved a lot of time."[1037]

> "The jurors have the case documents in a binder ... so they can write on them and the other documents are electronic..."[1038]

g) The issuance of orders in respect to disclosure of unused material by the prosecution as is required by statute or common law.

h) Regarding expert witnesses, according to several judges, pursuant to the common law both sides are obligated to exchange expert information.[1039] A judge during case management hearings can order experts to determine in what areas or issues they have agreement and disagreement.

[1035] Judge no. 8.
[1036] Judge no. 1.
[1037] Judge no. 1.
[1038] Judge no. 1.
[1039] Judge no. 3.

> "When this practice becomes more common as in civil cases we will see a substantial reduction in issues and the case becoming more simplified without the judge having to enter the fray."[1040]

> "As a result of the new Criminal Procedure Rules we now direct the experts to meet or communicate and draw up areas of agreement and disagreement that has been borrowed from the civil into the criminal. A colleague goes further and advises the advocates initially to jointly instruct ... I'm not sure that we have that power presently ..."[1041]

There is no suggestion or hint from any of the nine judges that the managerial rules have altered the traditional vote of the trial jury. Decisions as to specific indictments pruned and evidentiary organization remain firmly within the purview of the trial advocates. The rules do allow the judge to manage the indictment, evidence and trial schedule so that the case is cogent, organized and tried with efficiency to the benefit of the jury.

XII. Jury Selection and Jurors with Expertise

The principle of randomness in jury selection received strong judicial support. The judges characterized the composition of English juries as people from all walks of life who after selection by the luck of the draw, pool their experience, background and training in reaching a verdict. Some jurisdictions use a method to cull out prejudice or other problems that may exist with the first twelve jurors drawn by not immediately swearing the jurors in that day. The reasoning is that the drawn jurors are therefore

[1040] Judge no. 5.
[1041] Judge no. 4.

permitted overnight to consider and weigh any issues which might prevent service on that jury such a bias or problems associated with a lengthy trial. A number of potential jurors are held in reserve overnight to be released once a jury of twelve is sworn.

The following is a representative opinion in favour of the random jury, describing it as:

> "People from all walks of life pool their experience, juror expertise is not a concern because the judge tells them to decide the case only on the evidence they have heard. There are pros and cons in terms of eliminating people from the jury. For example, we will excuse employees of the Revenues and Customs Excise Service automatically in a tax case because of the automatic perception of unfairness. However eliminating jurors because of their education or employment may lead to an artificial selection of the jury."[1042]

The Crown Prosecution Service inspector general's post trial evaluation of the lengthy Jubilee Line trial did not find significant problems regarding the background or abilities of the jury in that case. The findings were characterized by one observer as follows:

> According to Stephen Wooler, the problems that arose in the Jubilee Line case did not indicate the fraud cases are unsuitable for jury trial. Rather, the trial shows how cases which are intrinsically manageable can become unmanageable because of the way they are handled and trials can become very long and complex as a result.[1043]

[1042] Judge no. 7.
[1043] Sally Lloyd-Bostock, *The Jubilee Line Jurors, supra*, note 509.

A number of the judges did acknowledge that lengthy trials generally do not result in a truly random jury because prospective jurors with professional economic or social hardships are excused.

A judge described in detail the problems associated with random selection in trials of extended length:

> "Robin Auld notwithstanding, in a lengthy trial, for example three months, we still are not getting a representative sample. Those who can sit for three months may not be the people you want hearing a complex case.
>
> In a straightforward week in Crown Court we have jurors who are summoned for two weeks. We tell them however that the trial for which they are before the court is a three-month trial. I ask "Can you tell me if you are unable to sit:
>
> > -Because you have a hospital or medical appointment;
> > -Because you pre-booked a holiday and have tickets, reservations, etc.
> > -Because you are self-employed in a small business or self-employed where your business could not stand your absence?
>
> Then you get the excuses such as:
>
> > 'I am a team leader in an engineering project for British Aerospace" or "I am in R&D and the project I am working on will be placed behind schedule with adverse consequences for my employees (subordinates) and my employer.'"
>
> We are likely to let this juror go because we can't have people sitting as jurors with havoc going on around them.
>
> Random selection isn't quite random is it?"[1044]

[1044] Judge no. 4.

The retention of prospective jurors presenting for jury service with the foregoing type of excuse was acknowledged by the judges to be a problem, but how it affects actual outcomes is unclear.

Another issue regarding jury composition discussed with the judges was the relatively recent removal of the automatic jury service disqualification for professions such as physicians, police officers, and judges. These professions now are part of the random mix, despite their obvious special knowledge and expertise. The question posed to the judges was "did the possibility of special expertise of a juror pose the risk of the juror becoming an un-sworn, un-cross examined expert who would lead the jury in the jury room?" The majority view in response was that the knowledge or expertise was not a problem:

> "If it's a case involving accounting and the juror called just happens to be an accountant, well that's too bad, one must accept that. The standard summing up advises them to try the case on the evidence in the courtroom and not to rely on outside information..."[1045]

Judge No. 4 described a similar case in which he tried as a barrister wherein a woman on a serious fraud jury turned out to be a chartered public accountant who led the charge for conviction of all the defendants. Moreover, she wrote a letter of complaint to the trial judge after he dismissed the charges during the trial against one defendant.

Other judicial comments on juror expertise consistent with the majority view are:

[1045] Judge no. 6.

> "The jury should be composed of ordinary people ... a broad spectrum should make the decision and that should include people from all walks of life and professions."[1046]

> "Since the early 1980s, the occupation of a juror has been excluded from the jury card, but I was at the bar before that when the occupation was on the card. I would regularly take the opportunity to look at those cards to consider the relevance of anybody's occupation to the trial that I was either prosecuting or defending."[1047]

> "A Jubilee Line case juror was an engineer, who kept the others straight. The fear here (in England and Wales) is not too much knowledge but lack of knowledge."[1048]

Judge No. 7, likely summarized the majority view that:

> "Randomness is an effort to seat people from all walks of life, and that the jury is instructed to decide the case on the evidence that they have heard, but their life experience is relevant to the task of evidentiary evaluation."

There is a strong minority view among the judges. While many of the judges view the presence of a juror with expertise in the subject matter of the trial as the luck of the draw,[1049] emphasizing randomness includes withholding the occupation of each juror so that it is unknown to the judge and barristers. Judge No. 3 expressed discomfort with police officers and judges serving on the jury. Judge No. 8 did say that his judicial colleagues chambered at his courthouse agreed with him that there are situations where juror expertise cut across the principal of randomness and that juror expertise may cause the case to be tried on more than the evidence before the court:

[1046] Judge no. 1.
[1047] Judge no. 2.
[1048] Judge no. 5.
[1049] Judge no. 5.

> "We tell jurors that they are to try the case based on the evidence in the case before them but it is hard for any juror to put their knowledge and expertise aside. Many of my colleagues agree with that."[1050]

Judge No. 9 agreed in a more limited way:

> "I do think the notion of opening up juries to those actually involved in the legal system is a step too far. When I say the legal system, I include police officers ..."

Judge No. 4 also mentioned a problem that he experienced when he had a police officer on a jury who discovered during the trial he knew the forensic expert. For that reason in his jurisdiction they now advise the jury of likely trial witnesses prior to swearing in the jury. Like Judge No. 9., he voiced reservations about police and judges serving as jurors, particularly given the concept of randomness:

> "The traditional position... is that if you have someone who has that expertise well and good, I'm sure about it. I think it's too far to have judges and policemen sit on juries ... in a criminal case police in particular are not who you would want on a dispassionate jury."[1051]

Despite the above concerns expressed about the composition of random juries, there is some objective evidence that one social or economic group does not dominate the jury deliberation process. Judge No. 1 noted that the individuals who he believed were likely to be selected foreperson based on dress and demeanor were frequently not elected by the peers, refuting inferentially the notion that there may be white collar dominance of the jury process. He also noted that jurors seem to zealously guard their vote and he does not think social or professional status trumps the juror's oath to use their own judgment. As

---

[1050] Judge no. 8.
[1051] Judge no. 4.

indicated earlier in this chapter, the judges are unanimously of the view that the jury is able to understand and rationally decide complex fraud cases.

The judges did not identify any commonly used summing up to the jury about special expertise or knowledge, but in the interviews some expressed an interest in that charge as it is delivered in America.[1052]

XIII. Plea Bargaining

The judicial consensus was that there is a role for plea bargaining in England and Wales:

> "I can see the point of it. There is a place for it, but I favor the present open court approach with the judge having the option to indicate the likely sentence in the event of the plea."[1053]

Whether plea bargaining will have a practical value in serious fraud cases is in dispute. Several of the judges believe that plea bargaining in serious fraud cases in England and Wales is less attractive to defendants than in the U.S. because the sentences are less severe in the U.K, consequently there is little to offer in serious fraud cases, because

---

[1052] *Jurors Use of Professional Expertise, New York Pattern Jury Instructions* - Civil 1:25 A, 46-48. The charge states:

> Although as jurors you are encouraged to use all of your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal professional expertise you might have or other facts not in evidence to the other jurors during deliberations. You must base your discussions and decisions solely on the evidence presented to you during the trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case.

[1053] Judge no. 8.

unlike in America, the sentences are not very long.[1054] Therefore they "have not seen plea bargaining make a difference".[1055]

Solicitor Ian Jones suggests the same comparing American plea bargaining with the proposals made by the Government Fraud Review in 2006, which advocate early plea bargaining in serious fraud cases to save court time and trial preparation costs:

> The plea bargaining arrangements in the U.S.A. have been developed against a background of potentially very lengthy custodial sentences together with a sentencing framework that provides a high degree of certainty about the actual sentence that will be imposed in respect of any particular plea bargaining agreement.
>
> The recommendation of the Review is that a formal plea bargaining system should be agreed specifically for serious

[1054] Judges nos. 4 and 6 consider recent American sentences in serious fraud cases. For example, Jeffrey Skilling of Enron received 25 years imprisonment as did Bernard Ebbers, the former CEO of World Com, both for fraud. L. Dennis Kozlowski received 8½ to 25 years for looting Tyco of 150 million dollars for his own use. Ebbers argued on appeal that his sentence was excessive, particularly when compared to the sentences of other officials from his former company, for example, the Chief Financial Officer received five years and the Accounting Director and Comptroller each received 1 year. The Second Circuit Court of Appeals acknowledged that 25 years was a long sentence for white collar crime:

> "Longer than the sentences routinely imposed by many states for violent crimes, including murder.
>
> ...
>
> The securities fraud here was not puffery or cheerleading or even a misguided effort to protect the company, its employees, and its shareholders from the capital – impairing effects of what was believed to be a temporary downturn in business...
>
> ...
>
> The methods used were specifically intended to create a false picture of profitability even for professional analysts that, in Ebbers case, was motivated by his personal financial circumstances."

The court noted that the disparity in sentences was acceptable because the others were Effers subordinates and that they had pleaded guilty and cooperated with prosecutors. The Associated Press, *Conviction of Ex-World Com Chief was Upheld*, NY Times, July 29, 2006, C2.

[1055] Judge No. 6; Judge No. 4.

> and complex fraud cases. It envisages that the prosecution would have the option to provide a case statement to a suspect and his representative indicting the nature of the case and the suspect's role in it. The suspect would provide a "without prejudice" response setting out the extent of accepted criminality. This would be followed by "without prejudice" negotiations to endeavor to agree not only the extent of the criminality but also a recommended realistic sentence package. The sentencing package would include any of the additional sentencing options that are recommended elsewhere in the Review. There would be access to a specialized fraud judge to seek agreement to the plea and sentence package or for the defense to seek an early sentence indication prior to further negotiations.[1056]

Another judge agreed with the opinion of the Fraud Review that a more American system of plea bargaining would have value:

> "There would be advantages to the Defendant to agree as to the basis of liability. Their advantage would be ... to limit the sums referable to their criminal conduct and therefore confiscation proceedings could be less damaging to them."[1057]

The judges as a group embraced the concept of plea bargaining. They did have concern about the format and setting in which the plea bargaining occurs. All were adamant that plea bargaining should not be coercive that the plea should be made only by the guilty and that whenever possible the judge should have full awareness of the defendant's criminality and prior record. One judge explained that under the present system that:

> "The problem with these indications is there is a tendency of the judge saying things in a broad brush way with too little information then finding out things later ..."[1058]

[1056] Ian Jones, Russell Jones and Walker, *Plea Bargaining – The Way Forward?*, www.rjw.co/uk/library/articles/pleabargaining.
[1057] Judge no. 7.
[1058] Judge no. 9.

The judges did not voice concern about the stage of the case in which the plea bargain occurs. The Government Fraud Review advocated a discussion of the possible plea early in the proceedings rather than the present England and Wales practice of shortly before trial. The specific proposal of the Fraud Review sets forth a formal plea bargaining system (which may address judicial concerns) in which the prosecution may provide a case statement to the defense, the defense would respond with its own without prejudice statement acknowledging the facts of the criminality and without prejudice negotiations of all sentencing options into a sentence package is conducted. If there is agreement, a specialized fraud judge is consulted for a sentence indication.[1059]

There was a generalized sense of judicial comfort with the present system set forth in the Goodyear Guidelines in which the trial judge may indicate on the record in open court the likely sentence in the event of a plea if asked by the parties pursuant to a process started by the defense.[1060]

> "I favour the use of plea bargaining providing defendants are not coerced into pleading guilty to something they do not want to admit."[1061]

Under the Goodyear Guidelines not less than a seven day notice is required to seek an indication of the Prosecution and the Court. The prosecution should inquire if the judge "is in possession of or has had access to all the evidence relied on by the prosecution,

---

[1059] Judge no. 5.
[1060] R v. Goodyear [2005] EWCA Crim. 888 CA (Crim. Div.), [2005]; [2005] 2 CR. App. R. 20, #70, 73-77.
[1061] Judge no. 1.

including any personal impact statement from the victim of the crime, as well as any information of relevant previous convictions recorded against the defendant".[1062]

The future status of plea bargaining is summarized as follows:

> "I think could become earlier (indications) but advocates frequently are unwilling for their own reasons to get to a situation where the case could crack or fold too early. I think there is a proper basis that you could argue that it is in the best interest of the defendant and the Crown to investigate a plea bargain at an early stage before we get into the ghastly nightmare of discovery."[1063]

XIV. Average Length of Trial

Serious fraud trials vary in length.

The judges' experience is as follows:

As to Judge No. 1, the longest trial he presided over is 8 weeks; his average serious fraud trial lasts about 4-6 weeks;

Judge No. 2 found serious fraud trials to be as long as three months;

Judge No. 3 presided over trials ranging from six weeks to three to four months;

Judge No. 4 found the range to be two to three months to one year. The average trial for him is about two to three months;

[1062] R. v. Goodyear, *supra* note 1060.
[1063] Judge no. 8.

Judge No. 6's longest trial was two and one-half months but the main Defendant had jumped bail, the Defendant's lawyers resigned from the case, and he was tried in absentia with no lawyers representing him so there was no way to stipulate as to the evidence, documents, etc.;

Judge No. 7 conducted trials ranging three to nine months;

Judge No. 8 the range of trials conducted was two months to fifteen months.

Given the concern about lengthy jury trials, several of those interviewed offered that judge only trials were likely to be more brief:

> "A judge only trial would reduce pre-trial preparation, the length of the trial itself and costs. The reason being that both the details and length of presentation of the evidence could be greatly reduced and focused solely on the bare issues for decision."[1064]

> "I disagree that the presence of a jury on a long and complex case would have no marked effect on the length of the trial."[1065]

Judge No. 3 asserts that judge-only trials will likely not reduce trial length – indictments will not be pruned and the police/Serious Frauds Office investigators will be able to put all details before the jury. While that was a minority view, most of the judges expressed discomfort about the actions that the judge must take to reduce trial length in judge only trial as those steps may give the judge the appearance of bias or prejudgment of the case.

[1064] Judge no. 4.
[1065] Judge no. 3.

Thus the unanimous view of the judges was that any brevity achieved in judge only trials was not worth the appearance of judicial bias.

XV. Should The Defendant Choose The Mode of Trial?

In 1999 Lord Bingham C.J. proposed that defendants should be accorded the right to opt for a non-jury mode of trial, suggesting that this might be more likely in serious fraud cases.[1066]

The defendant was accorded the opportunity to choose the mode of trial for trials on indictment in the original provisions of the Criminal Justice Act 2002-03. That putative right was removed from the bill in a cloud of parliamentary controversy.[1067]

The decision to not give the defendant the choice of mode of trial in cases on indictment was strongly endorsed by the judges interviewed. In the interviews the judges were given an explanation that mode of trial choices are granted to the defendant by statute in New York State and even though reminded that the defendant was slated to receive this right in the initial version of CJA 2002-03, all of the judges rejected the concept of permitting the defendant to have the choice of mode of trial. Many of the judges did, however, believe that the decision about mode of trial should be exclusively judicial (rather than accorded to one side or the other), with both sides able to argue for or against the proposed mode of trial.

[1066] Confidential communication from a third-party on file with the Author.
[1067] Miriam Peck, Research Paper 06/57, *supra* note 934, 13.

Presently Section 43 of the Criminal Justice Act 2003 does not grant the defense the right to apply for a judge only trial but that section of the act has not been brought forward. The Fraud (Trial Without a Jury) Bill 6 of 2006-07, which has passed the House of Commons but has been delayed by the House of Lords would impose by statute the implementation of non-jury trials,[1068] amending Section 43 and 48 of the Criminal Justice Act 2003:

> "To require that application for non-jury trial under section 43 and any non-jury trials resulting form such applications, should be heard by a High Court Judge (sitting as a judge of the Crown Court)."[1069]

The judges' argument that the defendant should not be given the opportunity to choose the mode of trial was best reasoned as follows:

- "For defendants, some of whom may want trial by jury; others trial by judge alone. Presumably, only those who feel that the judge may have a keener appreciation of their defense will opt for judge trial. *This could at least be the recipe for a most entertaining application for severance.*
- For the court list officer who receives the (no doubt coded) message – if *judge X is allocated to this case this will be a jury trial, but if judge Y – it will be trial by judge alone.*
- For the judge, now the judge of fact, who sees things going wrong with the prosecution case and puts them right (see below). (*Will an anxious and unhappy defendant be permitted to change his mind?*).
- For the parties who might both in foreseen and unforeseen circumstances have to call upon the judge to rule upon the admissibility of highly prejudicial material (also see below) and no squabble over whether he can possible try the case fairly, or be seen to do so.

[1068] 330 (5) (b) CJA 2003.

[1069] The United Kingdom Parliament, Explanatory Notes Frauds, Trial Without a Jury Bill as Introduced in the House of Commons on 16th November, 2006).

- For 'street-wise' jurors empanelled to try a case who will now resent the defendant (and not the prosecution) for their prolonged incarceration – *'The defendant knows he has no chance with a judge, that's why he is troubling us.'*
- For the Court of Appeal, who will have to sort all of this out, and review (possibly even related) trials in which a jury has returned a simple verdict of guilty in one and a judge has given a reasoned judge in the other."[1070]

Another judge, asserting that the mode decision should be exclusively in judicial discretion as a part of the trial management process, reasoned to the contrary, noting that if the prosecution is to be given the choice of mode of trial, it is only fair that the defendant be given that device also.[1071]

Several other judges were willing to consider the defendant having a choice in the mode of trial, but were concerned that it could be a tactical decision. For example, Judge No. 6 noted that before the defendant would choose the mode of trial, he would likely want to know the identity of the judge:

> "If I were a defendant I would need to know who that judge was going to be."

Judge No. 6 then expressed discomfort with shopping for the judge in judge only trials and emphasized that he favoured the present England and Wales system. Another of the judges concurred, asserted that the mode of trial decision:

> "Should be "principled" – defined as not a tactical decision to obtain advantage."

[1070] Judge no. 3.
[1071] Judge no. 2.

> "If there is a choice it should be up to the Court with each side making submissions. If both sides agree it should be given due weight, but in the end it should be the Court which makes decisions like that given the way our system has evolved. I don't think it is right either party should have the right to elect."[1072]

Another judge stated:

> "I suppose the argument is there are courses for horses – but I don't like the idea of any party being able to choose their tribunal in a criminal case. I like the system where you get the judge who is available to do it."[1073]

One judge was willing to give the defendant a choice (No. 2) and another offered that the defendant's might opt for a judge only trial where part of the proof may include a disproportionately high life style that does not equal the defendant's means.

> "One point that is forgotten by those who advocate for jury trial, I think there are circumstances where trial by jury is less to the defendant's advantage than trial by judge."[1074]

In the final analysis, the preference of all of the judges was to retain the present system which would require all indictable offenses to be tried by a jury.

XVI. Summary – The Future of Serious Fraud Trials

Predicting the ultimate parliamentary outcome of the serious fraud trial debate is far beyond the scope of this chapter. What does emerge from the small sample of judges interviewed is a fairly united judicial view of the way forward.

[1072] Judge no. 9.
[1073] Judge no. 1.
[1074] Judge no. 6.

They clearly not only favour jury trials, the judges are strong and in the case of many, passionate advocates for the jury. They believe that juries do a good job overall and that juries understand properly managed and presented serious fraud cases. There was no support for judge only trials replacing jury trials, and many of the judges expressed concerns about the perceived and actual fairness of judge only trials. The judges have a high rate of agreement with and acceptance of the jury outcomes before them. All of the judges felt strongly that the quality of prosecution will dictate trial organization and juror understanding that quality advocacy can shorten and make understandable complex cases.

The judges do not view a judge only trial as an improvement over the jury and most of them expressed trepidation about substituting judicial decision making for that of the jury. There is no overwhelming opinion that judge only trials would be shorter than jury trials and the view was held by certain of the judges that bench trials could be based on more complex (and not necessarily provable) prosecution indictments.

The judges agreed that CJA 2003 broadened the rules of evidence in England and Wales making more hearsay and other evidence newly admissible. Many of the judges felt in light of that broadening that bench trials would not result in significantly different evidentiary rulings than a jury trial.

The judicial posture was unanimous that the present regime of rules and directives have significantly shortened jury trials, making them more readily understandable to the jury.

Likewise the judges did not view the pruning case management process as significantly reducing the culpability of accused fraudsters. The overwhelming view is that indictment pruning and pretrial management hearings in which agreed facts are stipulated to, core documents identified, disputes on evidentiary issues resolved and expert testimony vetted all are consistent with the essentials of modern trial practice in any case, putting before the trier of fact a cogent provable case with clarity and precision.

There is support for random jury selection but concern among some of the judges about the service of jurors like police officers and judges. The judges favor plea bargaining, but some of them are skeptical about whether or not it will ultimately achieve what the government fraud review predicted fewer serious fraud trials.

Finally most of the judges favor the present system requiring the trial of all indictable offenses before a jury and would not favor giving the defendant a choice of the mode of trial if the present law were to change.

CHAPTER 10

CONCLUSION

> *"Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking "the judge was biased"".*
>
> Lord Lane, R. v. Bath [1990] Crim. L. R. 272

The spectre of jury ineptitude has driven the debate in favour of judge only trials and has constrained policy regarding mode of trial decision making. The Auld report states that juror capacity to deal with "the burdensome length" and increasing complexity of serious fraud cases "put(s) justice at risk":

> "The Director of Serious Fraud Office has recently said that the average length of a serious fraud prosecuted by it is six months, which would come largely before a jury of "the unemployed or unemployable".[1075]

This thesis has examined the jury and bench trial with this haunting concern in mind along with other significant elements and factors which individually and combined can impact on the soundness of each mode of trial. Fortunately different conclusions are reached in this work which challenge the accuracy of this dire warning of the Director of the Serious Fraud Office, and refute the main complaints of other critics of jury trials. The conclusion reached herein is that trial by jury is sound. Trial by judge is not presently a mode of trial that engenders confidence but it can be a sound alternative in England and Wales and the U.S.A. if reformed to create more certainty regarding the

[1075] The Auld Report, *supra* note 16, at Chap. 6 #183.

process to be followed. Therefore the conclusions and recommendations to improve both modes of trial are set forth below.

I. Should Juries Continue?

I conclude that the jury is a culturally important political instrument of longstanding significance to the U.S.A., Canada and England and Wales. Trial by jury is a protected right in Canada and the U.S.A., and is a legal and cultural precedent protected by statute in England and Wales. Indeed in jurisdictions in which the human rights, due process, or civil rights model of justice are the philosophical objectives of the justice system, the jury is a guarantor that outcomes are not reached by permanent state agents such as judges.

There is an artificial division between policy and practice in this debate. In each of the comparator jurisdictions mode of trial decisions are set forth in political instruments and are frequently fodder for political posturing. For example, the Blair government's pursuit of trial by judge in certain serious fraud cases blaming juries for collapsed trials, or unsupported myth that juries in America in civil cases are biased against corporations are examples of political policy arguments which lack a sound factual basis.[1076]

[1076] Valarie Hans, Business on Trial (2000 Yale University Press) 216-218.

Redmayne points out that juries are competent fact finders, provide citizen participation, and offer the defendant in criminal cases peer decision making thereby providing succor to nations with emphasis on due process.[1077]

The extent to which the jury offers the defendant peer review is properly the object of discussion. In culturally diverse societies like America and England and Wales, making the jury pool more representative is an important objective. Cheryl Thomas and Nigel Balmer have concluded that England and Wales juries are in fact racially and culturally balanced based on studies of jurors summoned to representative courthouses.[1078] Abramson points out that a randomly selected jury is not necessarily impartial.[1079]

Random jury selection as practiced in England and Wales poses problems given the absence of voir dire. By contrast as noted in chapters 2 and 3, American voir dire creates citizen discontent and a sense that juries are crafted by lawyers to be biased. Not withstanding those problems, the notion of judges serving as fact finders without the option of jury trials creates discomfort among the judiciary. The research conducted in this thesis demonstrates that the England and Wales judges interviewed have real concerns that judicial fact finding will create cultural concerns and/or public opinion that is suspicious of judicial bias in criminal cases.

[1077] Michael Redmayne, *Theorizing Jury Reform*, in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros Eds, The Trial on Trial, Vol. 2, 101-105, (2006 Oxford and Portland Press).
[1078] Cheryl Thomas and Nigel Balmer, Diversity and Fairness in Jury System, ii-iv, (2007 Ministry of Justice Research Series 2/07).
[1079] Jeffrey Abramson, We, The Jury, 122-123 (1994 Basic Books).

I would note that the intensive efforts in the comparator nations to obtain a representative jury pool are precursors to the tidal wave of doubt that may follow if jury trials are eliminated to be replaced by judges. Method of judicial selection will be of even greater significance and the cultural diversity of the judiciary will be even more important. Judges cannot bring to the task of fact finding the same broad cross section of all walks of society available when jurors are summoned to the courthouse.

Creating panels of judges, apart from the expense associated therewith, would likely not significantly increase diversity. Some might suggest that such a panel would provide comfort to the sole trier of fact as a decision maker, but the problem is more complex. As noted by Judge Number 7 in Chapter 9 the judge as the trier of law in common law adversarial justice system must render a series of decisions commencing in the pretrial phase up through the trial that inevitably requires extensive discourse and comment about the facts in the case as applied to the law. This pretrial knowledge of the facts in the case is contrasted with the absolute ignorance of the facts on the part of the jury when first empanelled. An unfavorable decision or even a gesture by the judge may suggest to the litigants prejudice or predisposition, a very different role than the continental system judge as noted in Chapter 9. A three judge panel would likely not relieve that problem, as the trier of law will also serve as the trier of fact, and thus pretrial exposure remains a concern. The mode of trial debate need not be an either/or proposition, the choice of mode of trial can be given to the defendant without causing systemic harm. The academic focus and that of the legal establishment should therefore be directed toward making each mode of trial equivalent, fair and available to the accused at his/her option.

Most objective academic studies confirm the opinions of the overwhelming number of lawyers and judges that the jury system works. The reason the legal establishment including judges and bar associations support the continuation of trial by jury in criminal cases is a clear sense that fairness is achieved and justice is done in that mode of trial.

II. Juries Have the Confidence of the Judiciary

What is indisputable from this study is the strong level of agreement and confidence expressed by the U.S.A. and England and Wales judiciary in jury verdicts in all cases and particularly in complex and serious fraud trials. Each and every England and Wales judge interviewed expressed a strong preference that all criminal cases including serious fraud cases be tried by a jury. Each and every judge also expressed a high level of confidence in jury verdicts, offering the view that juries are able to understand complex cases.

The New York State judges surveyed also expressed a high level of agreement with the jury verdicts before them, particularly in complex cases -- 78% of the surveyed judges agreed with juries in complex criminal cases over 75% of the time and in complex civil cases, 58% agreed with the jury over 75% of the time. In all criminal cases 89% of the judges surveyed agreed with the jury over 75% of the time and in all civil cases 77% agreed with the jury over 75% of the time. Coupled with the work performed by others

over the last several decades in both England and Wales and the U.S.A., this study shows that the claims made in the England and Wales parliament and the U.S.A. that juries lack the competence to try serious fraud and other complex case are without support by the judges who observed them.[1080]

III. Judge only Trials Can Be a Sound Alternative to Jury Trials

The survey results demonstrate that in New York State complex bench trials are of a shorter duration than complex jury trials. Interviews with judges in England and Wales found a closely divided opinion on whether complex judge only trials would take less time than complex jury trials.

The survey further indicates that New York State judges and lawyers both believe that case complexity is an important basis to choose a judge only trial. However, the survey also suggests that there are procedural impediments which make that choice less attractive in the absence of changes. It is telling that in New York State, where the defendant can choose a bench trial in a criminal case and the parties can choose a bench trial in a civil case, both the judges and attorneys surveyed believe that a bench trial is rarely considered as an option to the jury trial. Major factors which militate against that choice include the identity and personality of the trial judge and the belief that juries are more sympathetic than judges. On the other hand judge only trials were viewed more favorably in complex cases and/or where there is an unsympathetic defendant. The

[1080] Kalven and Zeisel, *supra* note 547; Levi (1993) *supra* note 913; Lloyd Bostock, [2007] *The Jubilee Line Jurors*, *supra* note 509; Eisenberg, Hannaford-Azor Hans, Waters Munsterman, Schwab and Wells [2005], *supra* note 918.

following is a review of the component factors which influence mode of trial choices with recommendations for change to make the modes of trial more comparable and consequently enhance the likelihood of the selection of the bench trial:

1. The Rules of Evidence. There should be uniformity in the application of the rules of evidence. The rules of evidence should either be the same as between judge only and jury trials or there should be clearly declared distinctions with codified judge only trial rules. It appears that presently in the U.S.A. and England and Wales based on the attorney survey and the interviews with judges that the rules of evidence are applied differently in judge only trials. Chapter 7 recites cases in which American appellate courts have indicated that the rules of expert witness reliability differs from bench to jury. The Auld report advocated different judicial conduct in bench trials from jury trials in England and Wales. American lawyers surveyed say the evidentiary ruling are different between bench and jury trials, and while a majority of New York State judges gave survey responses which dispute this contention, England and Wales judges tacitly acknowledge this difference in conduct in their interviews.

Unlike England and Wales the hearsay rule in the U.S.A., California and New York State is narrow. The survey suggests reluctance on the part of the judges and lawyers to broaden the hearsay rule. This posture is relevant because it would suggest that particularly in the U.S. there will continue to be a wide gap between bench and jury trials in terms of evidentiary standards as the narrow application

will occur in jury trials and the more broad application will occur in bench trials. The standard for the admission of expert testimony should be the same in each mode of trial.

As suggested in Chapter 7, a best evidence hearsay rule applicable to both bench and jury trials is a reasonable alternative to the present undefined rules in bench trials.

2. Judicial conduct in Bench Trials Must Change to Avoid Either the Appearance of or Actual Prejudice.

a. Recusal from prejudicial material.

The survey of judges and lawyers and the interviews confirm that there is judicial exposure to prejudicial material during the pretrial phase which should be avoided if there is going to be a bench trial or in the alternative a mechanism should exist to permit reference of pretrial matters to another judge upon the application of a party.

As noted in the survey, judges engage in substantive pretrial discussions in criminal cases -- this is customarily in a management conference or in discussions that result in plea bargaining. The judges in England and Wales favour plea bargaining, with some expressing support for the Goodyear guidelines which are

far more narrow in scope than American plea bargaining and restrict the judge to only expressing the possible sentence on the record. Other England and Wales judges felt that a broadening of the guidelines to allow the judge more interaction in England and Wales regarding sentencing was indicated. Once again, there is a substantial risk of prejudice when the trial judge engages in this process in a judge only trial.

b. Judges should engage in conduct during the bench trial that is comparable to their conduct during the jury trial.

The survey of judges and lawyers and the interviews also demonstrate that in judge only trials, judges question witnesses more frequently and are likely to conduct themselves in a different manner than in jury trials. While that was not rated as a significant factor in mode of trial decision making in the survey, the identity and personality of the judge were the highest factors rated. It is logical to infer that judicial conduct during the trial is a manifestation of the judge's personality. Judge only trials should not be events wherein common law judges abandon the umpire-like role and don the robes of the continental/civil system judiciary. Both modes of trial should have the common bond of the passive judge. In reality there is no proper justification for different rules between judge and jury trials. What is inadmissible before one mode of trial should not be received into evidence in the other. The adversarial mode of trial should remain

the constant and the trier of fact passive with same rules applicable to either mode.

The judge should not conduct extensive inquiries during a bench trial, but as the trier of fact should ask precisely the same questions that he/she would allow the jury to ask. However the judge should be permitted, during the trial, to put interrogatories to counsel regarding both factual issues and theories of the case, to allow both sides to understand the trier of facts concerns and impressions, i.e. "Thus far Mr. Prosecutor I am unclear as what proof you have provided regarding a required statutory element. Can you direct me to it or will it be forthcoming?" If this statement is made in a bench trial, it will give both sides the opportunity to know the concerns of the trier of fact as proof is developed. If this statement is made in a jury trial, gaps in proof that may result in dismissal or conviction will be brought to counsels' attention for the purpose of modifying the presentation of the case. The bench verdict should be reasoned, offering the rational for its decisions and specific rulings on all issues reserved upon. The appellate review of a bench verdict should be precisely the same as the review of a jury verdict.

In jury trials when judges do question witnesses, most American jurisdictions call for a jury charge by the judge to the jury reassuring them that the questioning does not indicate that the judge has taken sides or formed a conclusion but rather asked the questions for clarification. This charge is neglected by many New York

judges and a similar instruction might be considered in England and Wales. Such a charge should be given in all jurisdictions when a judge questions witnesses.

IV. The Defendant Should be Allowed to Select the Mode of Trial and the Parties Should be Permitted One Peremptory Challenge of the Trial Judge in a Bench Trial

Bench trials in the U.S.A. are different from jury trials in the substantive ways set forth above particularly as to the application of the rules of evidence. As contemplated in England and Wales bench trials would also be very different from jury trials in complex cases. This finding alone should give policy makers pause before imposing a bench trial on a defendant in a complex case.

The survey results, the interviews with the England and Wales judges, and the debate in Parliament all underline uneasiness with judge only trials in complex cases as presently constituted in the U.S.A. and as proposed in England and Wales. The concern is apparent, that bench trials will not be as fair and neutral as jury trials. The New York State survey demonstrates that judicial personality and identity is a key factor in not considering bench trials and motivate the choice of mode of trial. The England and Wales judges expressed great concern about the burden imposed by bench trials upon the appearance of fairness and were candid that case hardening may be a possibility. They strongly opposed state imposed bench trials.

The following analysis and proposals suggest a way forward in the mode of trial debate.

1. Allow the Defendant to Choose the Mode of Trial

Allowing the defendant to choose the mode of trial mitigates certain concerns about appearances, as would permitting each side one peremptory challenge of the trial judge in a bench trial. Coupled with the procedural reforms suggested above, the survey suggests that judge only trials would be considered in complex cases and in cases with unsympathetic defendants, the very profile of a serious fraud case.

The surveys, interviews, and case law all demonstrate that under the present systems in England and Wales, New York State, the U.S. Federal Courts and California, bench trials are quite different from jury trials.

The differences which exist in modes of trial including the application of the rules of evidence, a much changed level of judicial participation, as well as much more potential to prejudice the trier of fact constitute the key differences in the modes of trial. Although empirical evidence is difficult if not impossible to gather in support of the proposition, it is a logical assumption if not a fair conclusion that these factors could create a different outcome in the same case in a jury trial as compared to a bench trial. Consequently the imposition of the mode of trial in serious fraud cases as is proposed by the government in England and Wales, works an unfairness upon the defendant and forces a mode of trial that may not have the confidence of the defendant, his counsel, or even the judiciary.

The mode of trial choice in New York State has provoked only 19% of the criminal cases to be tried by judge only, suggesting that there are significant concerns about the bench only mode of trial. As the survey of judges and attorneys confirms the bench mode of trial is infrequently considered. The reasons for the infrequent consideration of a bench trial include reservations about having one person serve as the trier of fact coupled with uneven application of the rules of evidence in bench trials as compared to jury trials. Inherently present is the problem of judicial case hardening. However, the recommendations made above to permit peremptory challenges of judges, to have uniformly applied rules of evidence, to modify judicial pretrial and intra trial conduct, would likely make bench trials more attractive in complex cases, as demonstrated by the survey showing that both complexity and an unsympathetic client are significant factors favouring a bench trial.

The England and Wales judiciary interviewed did not support giving the defendant mode of trial choice. It is the same philosophy which drives England and Wales opposition to peremptory challenges – the belief that the parties should not be allowed to tacitly impact the trial outcome through maneuvering the identity of the trier of fact. The difference regarding peremptory challenges reflects a cultural difference between the American and English justice system. However, given the stark contrasts between bench and jury trials, government imposition of judge only trials works greater violence upon the justice system than the foregoing proposals.

Judge #3, a distinguished England and Wales jurist with extensive experience, gave the most detailed objections to the mode of trial choice resting in the defendant and to the imposition of judge only trials, which are set forth below with the counter argument, bolstered by the results of this study:

A) Where there are multiple defendants, there will be severance problems. The answer is that the right to a jury trial is paramount and a jury trial is ordered for all if there is disagreement between the defendants to resolve the severance issue. Severances occur in any event as it is the present practice to split up defendants for trial in England and Wales and the U.S.A. for management purposes as noted in Chapter 9.

B) There will be judge shopping (For the judge in a bench trial). That may be but if it is based on the notion that both sides have an equal opportunity to shop, won't that at least give some enhanced sense of fairness? This paper advocates one peremptory challenge of the judge in a judge-only trial per side, or a stipulated judge selected from an available list agreed upon between the parties, is arguably more principled than the state imposing a judge only trial.

C) Judges will be asked to remove themselves during the case. As in California, once selected, the trial judge stays on the case, particularly once a substantive issue has been determined by that judge. Prior to that time as established in a trial management order, the parties each have one challenge of the judge to be exercised at the commencement of the case.

D) Judges will be exposed pretrial to prejudicial material. The issue of exposure to prejudicial material is salient and applicable as well to the government's pending proposal to have some serious frauds cases tried by judge only. The judge as trier of fact should refer prejudicial motions to another judge unless the parties stipulate otherwise. This is a principled solution that resolves any problems regarding appearances.

E) Street wise jurors will resent that it is not a judge only trial. The author has not found any published report of this phenomena nor heard about it anecdotally, but it certainly warrants further study.

The choice of mode of trial must be made early in the case, before a substantive decision is made by the judge and in the context of a grant of one challenge to the judge, if a bench trial is selected.

2. Allow the Parties One Peremptory Challenge of the Judge in Judge Only Trials. The parties should be allowed one (each) peremptory challenge to the trial judge in a judge only trial. As noted above, both the identity and the personality of trial judges were the highest factors weighed in the opinion of judges and lawyers in New York State. Some protections to the parties who opt for the bench mode of trial would appear to be sound and principled. This proposal has more urgency in England and Wales where Parliament continues to weigh legislation that would impose a bench trial in serious fraud cases. According the defendant some input or control over the identity of the judge to try him seems principled.

3. The Proposed System

A. England and Wales

1) England and Wales could create a several part system to permit choice of mode of trial and peremptory challenge of the judge. The proposed system would have the defendant advise the prosecution he is considering a judge only mode of trial. This discussion should be prompted by the presiding judge at the first management conference required as a part of the Lord Chief Justice of England and Wales control and management of heavy fraud and other complex criminal cases protocol.[1081]

2) The parties would thereafter discuss whether or not they can agree on a properly credentialed judge who is available to try the case either way, from the list proffered by the presiding judge consistent with the management protocol.

3) If the parties cannot agree, a judge is assigned and the defendant must promptly choose in a binding manner the mode of trial. If a judge only trial is selected by the defendant each side receives a peremptory challenge of the judge. A side would be defined as defendants with a common interest or position in the case. It would be possible, but not usual for the presiding judge to determine that more than one defendant would have a peremptory challenge if a judge only trial was selected.

[1081] Practice Direction, 22 March 2005, [2005] All Eur (D) 386 (Mar) (supra) 2(i)(a)(b).

4) If a jury trial is selected, the trial judge randomly assigned sits on the trial, with no peremptory challenges allowed.

This concept offers the defendant choice. It provides the prosecution with input and creates a procedure through which both sides may agree with regard to the identity of judge for a bench trial. If there is no agreement as to the specific judge but a bench trial goes forward, each is offered some control over the identity of the trier of law/fact, a quantum of control that is not available in the random selection format.

B. The U.S.A. and Canada

In U.S. Federal District Courts and New York State courts, and in Canadian Courts, the process would be the same as in England and Wales except it would be initiated when a judge is assigned to the case under the individual assignment systems in place in each jurisdiction.

There may be concern at first blush that some judges will be preferred by the parties to preside at bench trials and the other judges will see less service in that regard. This is a workload issue which is readily adjusted. Those judges less frequently selected for bench trials will be presiding at jury trials and any actual or perceived disparity in work load is purely an administrative matter.

V. The Managerial Approach Is Effective But Prejudice Should Be Avoided in Bench Trials

The protocols in England and Wales, including indictment pruning and attempts to reduce trial length are having success in England and Wales according to the judges interviewed. The system is comparable to the present U.S.A. case management. Most complex trials in the U.S.A. conclude without a Jubilee Line case like mishap although hung juries do occur, as the anecdotal references in Chapter 4 chronicle.

However, the notion of intensive case management by the trial judge does pose increased risk of prejudice as noted above. The judges and attorneys surveyed in New York State, a significant percentage of the judges in New York State in bench trials read the file (which can contain prejudicial and inadmissible material), decide substantive motions with prejudicial material and engage in substantive pretrials. Particularly where there is prejudicial evidence eligible for exclusion, the judge in a bench trial should require those decisions to be made by another judge. Care must be taken in substantive pretrials to protect the bench trial process from prejudice and/or the appearance of prejudice.

In the U.S.A., the New York judges and attorneys surveyed favored the imposition of time limits in trials, reflecting a sense that due process is not necessarily an endurance test for all involved.

VI. Jury Selection and Randomness

All jurisdictions must be concerned about the role of expert jurors in the jury room. The New York survey indicates a significant percentage where that expertise is believed to have had an influence on case outcome. Of the judges who had expert jurors serve on a jury, 54.5% said that expertise did not affect the verdict in their view, but 45.5% said it did. Some of the England and Wales judges expressed concerns about judges and police officers serving on randomly selected juries.

Neither random selection in England and Wales and Canada, nor the U.S.A. system of voir dire with peremptory challenges appear to answer the problem of more educated jurors being discharged in lengthy complex trials such as serious fraud cases. That there is a high degree of judicial confidence in jury outcomes should provide some succor that the impact of this potential imbalance is not adverse to a sound outcome. The problem is likely one that cannot be remedied, as Judge #5 noted in Chapter 9, potential jurors with responsible employment will likely frequently be unable to sit in lengthy trials.

VII. Jurors Should Not Publicly Comment Post-Trial on Deliberations Upon Completion of a Trial; Courts should be Permitted to Investigate a Breach of the Jurors' Oath

A modified version of the rule in England and Wales embargoing any juror comment post trial about verdicts would serve the U.S.A. well. In the U.S.A. jurors should be advised

that they are entitled to give their opinions and their position regarding the verdict, but that they are not permitted to disclose the details of the deliberations, the opinions of other jurors, or prior votes by the jury before the final verdict. On the other hand, the restrictions in England and Wales and the U.S.A. on investigation into jury deliberation conduct should be modified to permit the trial court to investigate any credible allegation that the jurors breached their oath.

VIII. Summary

It is the inescapable conclusion that the choice of mode of trial can determine the outcome of a case because it will determine the identity of the trier of fact and the tenor of the case, including the evidence that will be considered. Trial by judge can and should be an attractive alternative for a defendant to select, particularly in complex cases. Fairness dictates that the choice of mode of trial be given to the defendant and reason suggests that peremptory challenges of judges is fair and principled given the present status of judge only trials. Even in the random jury selection forum of England and Wales, the government can still stand aside jurors and under 43 C.J.A. 2003 and bill 6 of 2006-07 can exclusively ask for a judge only trial, giving the prosecution unfair advantage.

All of the comparator countries should strive to make the bench trial either comparable in rule or tone to the jury trial or with clearly established procedures and evidentiary rules that remove that mode of trial from judicial caprice.

Finally, and most significant, research in this thesis indicates a vital jury system which has the confidence of judges and lawyers in the U.S.A. and England and Wales. The perceived crisis prompting judge only trials and the notion of unconstitutional complexity is not supported by the professionals who actually hear and try complex cases.

Judge #5 best reflected the state of the jury:

> "I view the jury as the best measurement of truth or dishonesty. It is right that the jury should remain and I feel that very strongly – the guardian of the notion of honest or not is the jury."

Although bench trials are the defendant's choice in New York State they are rarely considered because of a lack of confidence in their structure and fairness. The comparator countries should strive to reform the judge only trial system so that mode of trial can receive an endorsement comparable that received by juries in the above quote. And the imposition of judge only criminal trials in common law countries should be resisted because of the flawed nature of that process which appears to impose one instrument of the state to sit in judgment as to guilt or innocence. As Judge Number 3 said:

> "It seems to me that it is far better to be judged by twelve of your peers than one judge. That is a right I believe we should maintain."

This view in America is based on the U.S. constitution and in England and Wales it is a cultural belief.

Trial by jury is a privilege in England and Wales as opposed to a right in the U.S.A. and Canada. The flaws projected in judge only trials of indictable offences discussed above raise the spectre that the imposition of judge only trials for serious fraud cases as presently proposed in Parliament would be unsound, particularly because juries are able to competently hear and try complex cases.

TABLE OF CASES

CALIFORNIA

People v. Dancks, 32 Cal.4th 269, 82 P2d 1249 (2004)

People v. Falsetta, 21 Cal.4th 903, 911 (1999)

People v. Fudge, 7 Cal. 4th 1075, 1108 (1994)

People v. Hutchinson, 71 Cal.2d 342, 78 Cal. Rptr. 196, 455 P.2d 132 (1969)

People v. Keenan, 46 Cal.3d 478, 540 (1988)

People v. Majors, 18 Cal.4th 385 (1998)

People v. McNeal, 90 Cal. App.3d 830, 153 Cal.Rptr.3d 206 (Ct. App. 1st District 1979)

People v. Phillips, 56 Cal. App. 4th 1307, 66 Cal.Rptr.2d 380 (2d Dist. 1997), *reh'g denied,* (Sept. 3, 1997), *cert. denied*, 118 S.Ct. 1395 (1998)

People v. Ramos, 689 P.2d 430 (Cal. 1994)

People v. Reyes, 19 Cal.4th 743 (1998)

People v. Santani, 80 Cal.App.4th 1194, 1200-1207(2000)

People v. Spello, 6 Cal.App.3d 685 (2 Dist. 1970)

Press Enterprises v. Superior Court of California, 464 U.S. 501 (1984)

School Dist of Okaloosa County v. Superior Court, 58 Cal. App. 4th 1126 (1997)

Solberg v. Superior, 19 Cal.3d 182, 561 P.2d 1148 (1977)

CANADA

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817

Ex Parte Lloyd, [1822] Mont. 70, n.8

The King v. Hayes (No.2), [1903] 9 C.C.C. 101 (B.C.S.C.)

R. v. A.G., [2000] 1 S.C.R. 439, 2000 S.C.C. 17

R. v. Bain, [1992] 1 S.C.R. 91

R. v. Barrow, [1987] 2 S.C.R. 694, 712-13

R. v. Bernardo, Jury Trials (National Judicial Institute, Nov. 27-29, 1995)

R. v. Betker, [1997] 115 C.C.C. (3d) 421 (Ont. C.A.)

R. v. Biniaris, [2000] 1 S.C.R. 381, 2000 S.C.C. 15

R. v. Brass, [1981] 4 W.W.R. 657 (B.C.S.C.)

R. v. Burlingham, [1995] 2 S.C.R. 206, 124 D.L.R. (4th) 7

R. v. Chambers, [1990] 2 S.C.R. 1293

R. v. Cleghorn, [1995] 3 S.C.R. 175

R. v. Cones, [2000] 143 C.C.C. (3d) 355 (Ont. C.A.)

R. v. Corbett, [1988] 1 S.C.R. 670, 64 C.R. (3d) 15 (S.C.C.)

R. v. Crawford, [1995] 1 S.C.R. 858, 37 C.R. (4th) 197 (S.C.C) (Sub. Nom. R. v. Creighton)

R. v. Creighton, [1993] 3 S.C.R. 3, 80 C.C.C. (3d) 421

R. v. Doe (No. 2), [1986] 31 C.C.C. (3d) 353 (Ont. Dist. Ct.)

R. v. Dyson, [1971] 5 C.C.C. (2d) 401 (Ont. H.C.J.)

R. v. Find, [1999] 126 O.A.C. 261 (Ont. C.A.), [2001] S.C.C. 32, [2001] 154 C.C.C. (3d) 97

R. v. Hahn (D.), [1995] 62 B.C.A.C. 6

R. v. Hollwey, [1992] 8 O.R. (3d) 114 (Ont. C.A.)

R. v. Hubbert, [1975] 29 C.C.C. (2d) 279, 31 C.RN.S. 27, 110.R.(2d) 464 (Ont. C.A.), *aff'd* [1977] 2 S.C.R. 267, 38 C.R.N.S. 381, 33 C.C.C. (2d) 207, 15 O.R. (2d) 324n

R. v. J J-L, [2000] 2 S.C.R. 600, ¶ 37

R. v. Johnston, [1992] 69 C.C.C. (2d) 395, 12 C.R. (4th) 99 (Ont. Gen. Div.)

R. v. Keegstra, [1991] 63 C.C.C. (3d) 110 (Alter. Can.), *appeal denied*, 66 C.C.C.2d vi

R. v. Kerr, [1995] 42 C.R. (4th) 118 (Ont. Ct. Gen. Div.)

R. v. Koh, [1998] 42 O.R. (3d) 668, 671, 131 C.C.C. (3d) 257, 1998 Ont. Rep. LEXIS 215

R. v. Lepage, [1995] 1 S.C.R. 654

R. v. Lessard, [1992] 74 C.C.C. (3d) 552 (Que. C.A.)

R. v. Mohan, [1994] 89 C.C.C. (3d) 402, 2 S.C.R. 9

R. v. Molodowic, [2000] 1 S.C.R. 420, 2000 S.C.C. 16

R. v. Morgan, [1995] 42 C.R.4th 126 (Ont. Gen. Div.)

R. v. Musitano, [1985] 24 C.C.C. (3d) 65, 25 D.L.R. (4th) 299 (Ont. Can.)

R. v. Musson, [1996] 3 C.R. (5th) 61, 32 W.C.B. (2d) 99 (Ont. Gen. Div.)

R. v. Pan, [1999] 134 C.C.C. (3d) 1 (Ont. C.A.), *affirmed by*, R. v. Pan; R. v. Sawyer, [2001] 2 S.C.R. 344, 2001 SCC 42 (Can. Sup. Ct.)

R. v. Parks, [1993] 84 C.C.C. (3d) 353, 24 C.R. (4th) 81, 15 O.R. (3d) 324, 65 O.A.C. 122 (Can.), *appeal denied*, [1994] 28 C.R.(4th) 403n, 87 C.C.C. (3d) vi, 72 O.A.C. 159n (S.C.C.)

R. v. Patterson, Valois And Guindon, [1976] 31 C.C.C. (2d) 353 (Ont. Dist. Ct.)

R. v. Perras, [1974] 18 C.C.C. (2d) 47, 51

R. v. Rogers, [2000] 38 C.R. (5th) 331, 47 W.C.B. (2d) 233 (Ont. S.C.J.)

R. v. Sherratt, [1991] 1. S.C.R. 509, 519-20, 535-36 n.10, 63 C.C.C. (3d) 193, 211-212 (f)

R. v. Taillefer, [1995] 100 C.C.C. (3d) 1 (Que. Can.)

Re Thomas and The Queen, [1973] 13 C.C.C. (2d) 78 (Ont. H.C.J.)

R. v. Thompson, [1977] NI 74, 83

R. v. Thompson, [1997] 1 S.C.R. 311

R. v. W (M.C.), [2002] 165 C.C.C. (3d) 129, 3 C.R.(6th) 64, ¶ 78 (B.C.C.A.)

R. v. Ward, [1993] 19 W.C.B. (2d) 239

R. v. Williams, [1998] 1 S.C.R. 1128, 124 C.C.C. (3d) 481

R. v. Yebes, [1987] 2 S.C.R. 168

R. v. Zacharias, [1987] 39 C.C.C. (3d) 280 (B.C.C.A.)

R. v. Zundel, [1987] 31 C.C.C. (3d) 97, 56 C.R. (3d) 1, *appeal denied*, [1987] 61 O.R. (2d) 588n, 80 N.R. 317n

ENGLAND AND WALES

Air Canada v. Secretary of Sate for Trade, (1983) 2 A.C. 394, 411, 1 All E.R. 910

Attorney General's Reference (No 2 of 2002), [2003] 1 CR.APP.R. 321

Attorney General v. Associated Newspapers, (1994) 2 A.C. 238

Ellis v. Deheer, (1922) 2 K.B. 113, 117-118

Harvey v. Hewitt, (1840) 8 Dowl 598, 599

In Re (R) Litigant in Person: Judicial Intervention, (2002) 1 F.L.R. 432

In Re Atty. Gen. Reference (No. 2 of 2002), [2002] EWCA Crim. 2373, (2003) 1 Cr. App. Rep. 321, 327

Jones v. National Coal Board, [1959] 2 Q.B. 55, 63-64

Lalchan Nanan v. The State, [1986] A.C. 860

Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd., [1915] A.C. 705

Meridian Global Funds Management Asia Ltd v. Securities Commission, (1995) 2 A.C. 500

Preece v. H.M. Advocate, [1981] Crim. L. R. 783

R. v. Ajvinder Singh, unreported, the summing up provided to the author by his Honor, Shaun Spencer

R. v. Argent, (1997) 2 Cr. App. Rep. 27

R. v. Armstrong, (1922) All E.R. 153 (C.A.), 16 Cr. App. Rep. 149

R. v. Bath [1990] Crim. L. R. 272

R. v. Bentley, [1998] T.L.R. 492

R. v. Birchall, [1999] Crim. L. R. 311, 313

R. v. Brandon, (1969) 53 Cr. App. Rep. 466

R. v. Andrew Brown, (1907) 7 N.S.W.S.R. 290

R. v. Burdett, (1820) 4 B. & Ald. 95, 120

R. v. Bow Street, Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 2), [2002] 1 A.C. 119, [1999] 1 All E.R. 577, [1999] 2 W.L.R. 272

R. v. Chaaban, [2003] E.W.C.A. Crim. 1012

R. v. Connor and another; R v. Mirza;and R. v. Rollock, [2004] U.K.H.L. 2, (2004) 2 W.L.R. 201, (2004) 2 C.R. App. Rep. 8, ¶120, 1 A.C. 1118

R. v. Cowan, [1996] Q.B. 373, 381, [1995] 4 All E.R. 939, [1996] 1 Cr. App. Rep. 1

R. v. Dallagher, [2002] EWCA Crim. 1903, (2003) 1 Cr. App. Rep. 195

R. v. Felixstowe Justices Ex Parte Leigh, [1987] 1 Q.B. 582

R. v. Ford, [1989] Q.B. 868, 3 All E.R. 445, 3 W.L.R. 762 (C.A.)

R. v. Gilfoyle, (2001) 2 Cr. App Rep. 57, ¶25 (C.A.)

R. v. Goodyear, [2005] EWCA Crim. 888, 3 All E.R. 117, ¶70 (C.A.)

R. v. Gough, [1993] AC 646, 2 WLR 883, 2 All E.R. 724, 737

R. v. Gray, [2003] EWCA Crim. 1001

R. v. Handy (J.), [2002] S.C.C. 56

R. v. Hood, (1968) 2 All E.R. 56, 1 W.L.R. 773

R. v. Howell, [2003] Crim. L.R. 405

R. v. Knight, [2004] Crim. L.R. 449

R. v. Jisl, [2004] E.W.C.A. Crim. 696, ¶ 114

R. v. Lawrence, [1995] Crim. L.R. 815

R. v. Leggett, Farmer and Hircock, (1968) 53 Cr. App. Rep. 51

R. v. Luttrell, [2004] E.W.C.A. Crim. 1344, 2 Cr. App. Rep. 520

R. v. MacKenney; R. v. Pinfold, [2003] E.W.C.A. Crim. 3643, [2004] 2 Cr. App. R. 32

R. v. Maguire, [1992] 1 Q.B. 936

R. v. McCluskey, (1994) 98 Cr. App. Rep. 216

R. v. McGarry, [1999] 1 Cr. App. R. 377

R. v. McIlkenny, [1992] 2 All E.R. 417, 93 Cr. App. Rep. 287

R. v. Miah, [1997] 2 Cr. App. Rep. 12

R. v. Mirza, R. v. Connor and R. v. Rollock [2004] U.K.H.L.2; 2 W.L.R. 201

R. v Millward, [1999] 1 Cr App R 61

R. v. Orgles, [1993] 4 All E.R. 533, 98 Cr. App. Rep. 185, 143 New L.J. 886

R. v. Qureshi, (2006) E.W.C.A. Crim. 2092, (2007) 1 Cr. App. R. (S) 534

R. v. Rhodes, (1899) 1 QB 77

R. v. Robb, (1991) 93 Cr. App. Rep. 161

R. v. Roble, [1997] Crim. L.R. 449

R. v. Silverlock, (1894) 2 Q.B. 766, 771

R. v. Smith, [2003] E.W.C.A. Crim. 283, 1 W.L.R. 2229

R. v. Smith and Mercea [2005] U.K.H.L. 12

R. v. Melanie Archer-Smith and Christopher Woodhead, unreported, the summing up provided to the author by his Honor, Shaun Spencer

R. v. Strudwick, (1993) 99 Cr. App. Rep. 326

R. v. Sweetland, (1957) 42 Cr. App. Rep. 62 (C.C.A.)

R. v. Thompson, [1980] Q.B. 229, [1980] 2 All E.R. 102, 2 W.L.R. 521

R. v. Martinez-Tobon, (1994) 2 All E.R. 90, 1 W.L.R. 388, 397

R. v. Turner, [1975] 1 Q.B. 834

R. v. Wang, (2005) 2 Cr. App. Rep. 8, 169 J.P. 224, (2005) Crim. L. R. 645

R. v. Young (Stephan), [1995] Q.B. 324, 2 Cr. App. Rep. 379, 2 WLR 430

Ras Behari Lal v. King-Emperor, (1933) 50 T.L.R. 1

Rayner v. Davies, [2002] E.W.C.A. Civ. 1880

Rice v. Connolly, [1966] 2 All E.R. 649, 2 Q.B. 414

Seer Technologies Inc. v. Abbas, [2000] LTL C9200208, N.Y. Times, Mar. 16, 2000

Smith v. Director of Serious Fraud Office, [1992] 3 All ER 456, 3 WLR 66

Lilley v South Worcestershire Justices, [1995] 4 All ER 186, [1995] 1 WLR 1595, ex P. Lilley, (1995) 1 W.L.R. 1995, 1998

Southwark London Borough Council v. Kofi-Adu, [2006] EWCA Civ. 281, ¶148

Tesco Supermarkets Ltd v. Nattrass, [1972] A.C. 153, 2 All E.R. 127, HL

Vaise v. Delaval, [1785] 1 T.R. 11, 99 E.R. 944 (K.B.) 1 Durn E II

Wetherall v. Harrison, [1976] Q.B. 773, 1 All ER 241, 244

Yuill v. Yuill, [1945] P. 15, 20, 61 T.L.R. 176, 1 All E.R. 183

EUROPEAN COURT OF HUMAN RIGHTS

Beckles v. United Kingdom, [2002] Eur. Ct. H.R. 44652/98, (2002) 36 EHRR 13

Condron v. United Kingdom, [2000] Eur. Ct. H.R. 35718/97, (2000) 31 EHRR 1

Doorson v. Netherlands, [1996] Eur. Ct. H.R. 20524/92, (1996) 22 EHRR 330

Gregory v. United Kingdom, [1997] Eur. Ct. H.R. 22299/93, (1998) 25 EHRR 577

Sander v. United Kingdom, [2000] Eur. Ct. H.R. 34129/96, (2001) 31 EHRR 44

Schenk v. Switzerland, [1988] Eur. Ct. H.R. 10862/84, (1991) 13 EHRR 242

NEW YORK STATE

Carroll v. Gammerman, 193 A.D.2d 202, 205-206 (N.Y. App. Div. 1st Dept. 1993)

Herald Co. v. Roy, 107 A.D.2d 515, 487 N.Y.S.2d 435 (App. Div. 4th Dept. 1985), *appeal dismissed,* 65 N.Y.2d 922, N.Y.S.2d 1031, 483 N.E.2d 135 (Ct. App. 1985), *appeal denied,* 65 N.Y.2d 610, 494 N.Y.S.2d 1025, 484 N.E.2d 1052 (Ct. App. 1985)

Hershowitz v. Tompkins, 184 A.D.2d 402, 404 (N.Y. App. Div. 1st Dept. 1992)

Newsday v. Sise, 120 A.D.2d 8 (N.Y. App. Div. 2d Dept. 1986)

Newsday v. Sise, 71 N.Y.2d 146, 524 N.Y.S.2d 35, 518 N.E.2d 930, *cert. denied,* 486 U.S. 1056, 108 S.Ct. 2823, 100 L.Ed.2d 924 (1987)

People v. Anderson, 70 N.Y.2d 729 (Ct. App. 1987)

People v. Arnold, 96 N.Y.2d 358 (Ct. App. 2001)

People v. Balacky, 203 A.D.2d 471 (N.Y. App. Div. 2nd Dept. 1994)

People v. Brown, 48 N.Y.2d 388 (Ct. App. 1979)

People v. Browne, 307 A.D.2d 645 (N.Y. App. Div. 3d Dept. 2003)

People v. Buford, 69 N.Y.2d 290, 299 (Ct. App. 1987)

People v. Cahill 2 N.Y.3d 14 (Ct. App. 2003)

People v. Camacho, 293 A.D.2d 876 (N.Y. App. Div. 3rd Dept. 2002)

People v. Carrasco, 262 A.D.2d 50 (N.Y. App. Div. 1st Dept. 1996)

People v. Chavez, 275 A.D.2d 888 (N.Y. App. Div. 4th Dept. 2000)

People v. Cherry, 188 Misc.2d 799 (N.Y. Sup. Ct. N.Y. County 2001)

People v. Dazi, 195 A.D.2d 571, 600 N.Y.S.2d 276 (N.Y. App. Div. 2nd Dept. 1993)

People v. Fermin, 235 A.D.2d 328 (N.Y. App. Div. 1st Dept. 1977)

People v. Firestone, 111 A.D.2d 696, *appeal denied*, 65 N.Y.2d 927 (N.Y. App. Div. 1985)

People v. LaTorres, 186 A.D.2d 479 (N.Y. App. Div. 1st Dept. 1982), *appeal denied*, 81 N.Y.2d 842 (Ct. App. 1993)

People v. LaValle , 3 N.Y.3d 88 (Ct. App. 2004)

People v. Liguori, 149 A.D.2d 624 (N.Y. App. Div. 2d Dept. 1989)

People v. Maddox, 139 A.D.2d 578 (N.Y. App. Div. 2d Dept. 1988)

People v. Majeed, 204 A.D.2d 986 (N.Y. App. Div. 4th Dept. 1994)

People v. Maragh, 94 N.Y.2d 569 (Ct. App. 2000)

People v. Mateo, 2 N.Y.3d 383 (Ct. App. 2004)

People v. McClenton, 213 A.D.2d 1 (N.Y. App. Div. 1st Dept. 1995)

People v. McIlwain, 188 A.D.2d 666 (N.Y. App. Div. 2nd Dept. 1992)

People v. McIntyre, 193 A.D.2d 626 (N.Y. App. Div.), *appeal denied*, 82 N.Y.2d 757 (Ct. App. 1993)

People v. Mendes, 3 N.Y.2d 120 (Ct. App. 1957)

People v. Moreno, 70 N.Y.2d 403, 405 (Ct. App. 1987)

People v. Olcott, 2 Johns. Cas. 301 (N.Y. Sup. Ct. 1801)

People v. Owens, 188 Misc.2d 392 (N.Y. Sup. Ct. Monroe County 2001)

People v. Paz, 159 A.D.2d 987 (N.Y. App. Div. 4th Dept.), *appeal denied*, 76 N.Y.2d 793 (Ct. App. 1990), *reh'g denied, appeal denied*, 77 N.Y.2d 842 (Ct. App. 1991)

People v. Rivera, 304 A.D.2d 841, 759 N.Y.S.2d 136 (N.Y. App. Div. 2d Dept. 2003)

People v. Rogers, 266 A.D.2d 481 (N.Y. App. Div. 2d Dept. 1999)

People v. Rukaj, 123 A.D.2d 277 (N.Y. App. Div. 1st Dept. 1986)

People v. Sanchez, 99 N.Y.2d 622, 790 N.E.2d 766, 760 N.Y.S.2d 391 (Ct. App. 2003)

People v. Santana, 221 A.D.2d 175 (N.Y. App. Div. 1st Dept. 1995), *appeal denied*, 87 N.Y.2d 925 (Ct. App. 1996)

People v. Sheldon, 156 N.Y.Rep 268 (1898)

People v. Sims, 127 A.D.2d 805 (N.Y. App. Div. 2d Dept. 1987)

People v. Taylor, 135 A.D.2d 848 (N.Y. App. Div. 2d Dept. 1988)

People v. Testa, 94 A.D.2d 852 (N.Y. App. Div. 3d Dept. 1983), *rev'd* 61 N.Y.2d 1009, 43 N.E.2d 1223 (Ct. App. 1984)

People v. Tisdale, 270 A.D.2d 917 (N.Y. App. Div. 4th Dept. 2000), *appeal denied*, 95 N.Y.2d 839 (Ct. App. 2000)

People v. Torres, 249 A.D.2d 229, 673 N.Y.S.2d 72 (N.Y. App. Div. 1st Dept. 1998)

People v. Van Akin, 197 A.D.2d 845 (N.Y. App. Div. 4th Dept. 1993)

People v. Watts, 173 Misc.2d 373, 661 N.Y.S.2d 768 (Sup. Ct. 1997)

People v. Wernick, 89 N.Y.2d 111 (Ct. App. 1996)

People v. White, 204 A.D.2d 750 (N.Y. App. Div. 2nd Dept. 1994)

People v. Whitmore, 45 Misc.2d 506 (Sup. Ct. Kings Co. 1965)

People v. Williams, 202 A.D.2d 1004 (N.Y. App. Div. 4th Dept. 1994)

People v. Yu and Wai Tom, 53 N.Y.2d 44, 56 (Ct. App. 1981)

Sollins v. Alexander, 236 N.Y.L.J. 19, Index No: 601272/2006, 7/28/06

U.S.A. – FEDERAL & STATE JURISDICTIONS EXCEPT CAL. & N.Y.

ABC, Inc. v. Stewart, 360 F.3d 90 (2d Cir. 2004), *on remand,* U.S. v. Stewart, 305 F.Supp2d 368 (S.D.N.Y. 2004)

Aldrige v. U.S., 283 U.S. 308 (1931)

Barefoot v. Estelle, 463 U.S. 880 (1983)

Baston v. Kentucky, 476 U.S. 29 (1986)

Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978)

Blanton v. City of North Las Vegas, 489 U.S. 538 (1989)

Brown v. Texas, 522 U.S. 940, 118 S. Ct. 355 (1997)

California v. Ramos, 463 U.S. 992, 1026-1027 (1983)

Clark v. U.S., 289 U.S. 1 (1933)

Coppolino v. State, 223 So.2d 68 (Fla. Ct. App. 1969), *appeal dismissed,* 234 So.2d 120 (Fla. 1969), cert. denied, 399 U.S. 927 (1970)

Cotton v. Witco Chem. Corp., 651 F.2d 274 (5th Cir. 1981) (granting jury trial demand), cert. denied, 102 S. Ct. 1256 (1982)

Daily v. U.S., 139 F.2d 7 (7th Cir. 1943)

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 2792 (1993)

DeLuna v. U.S., 308 F.2d 140 (1962)

Duncan v. Louisiana, 391 U.S. 145 (1968)

Edmonson v. Leesville Concrete, 500 U.S. 614 (1991)

Escobedo v. Illinois, 378 U.S. 478 (1964)

Fellows v. Medford Corp., 431 F.Supp. 199 (Dist. OR. 1977)

Fields v. Woodford, 281 F.3d 963, 975-976 (9th Cir. 2002), *amended by*, 309 F.3d 1095 (9th Cir. 2002), *substituted opinion*, 309 F.3d 1095 (9th Cir. 2002), *amended by*, 315 F.3d 1062 (9th Cir. 2002), *reprinted as amended,* 2002 U.S. App. LEXIS 27124 (9th Cir. Cal. Feb. 22, 2002), *appeal after remand*, 431 F.3d 1186, (9th Cir. 2005), *reh'g, en banc, granted by, vacated*, 2006 U.S. App. LEXIS 23966 (9th Cir. Sept. 21, 2006), *corrected,* 465 F.3d 397 (9th Cir. 2006)

Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)

Fullwood v. Lee, 290 F.3d. 663, 683-684 (4th Cir. 2002)

Furman v. Georgia, 408 U.S. 238 (1972)

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

Georgia v. McCollum, 505 U.S. 42, 59 (1992)

Gideon v. Wainright, 372 U.S. 335 (1963)

Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951 (1967)

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)

Godinez v. Moran, 509 U.S. 389, 396-97 (1993)

Gonzales v. National Bd. Of Med. Examiners, 225 F.3d 620, 625 (6th Cir. 2000)

Ham v. South Carolina, 409 U.S. 524 (1973)

Hancock v. Elam, 62 Tenn. 33, 3 Baxt 33 (Sup. Ct. 1873)

Harris v. Alabama, 513 U.S. 504, 115 S. Ct. 1031, 1039 (1995)

Holt v. U.S., 218 U.S. 245, 31 S. Ct. 2 (1910)

ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978) (denying jury trial demand), *aff'd on other grounds*, 636 F.2d 1188 (9th Cir. 1980)

In re Application of Wash. Post (U.S. v. George), 20 Media L. Rep. 1511 (Dist. D.C. 1992)

In re Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988)

In re Disclosure of juror Names and Addresses, 592 N.W.2d 798 (Mich. Ct. App. 1999)

In Re Express-News Corp., 695 F.2d 807, 810 (5th Cir. 1982)

In re Globe Newspaper Co., 920 F.2d 88, 93 (1st Cir. 1990)

In re Indianapolis Newspapers, Inc., 837 F. Supp. 956 (S.D.Ind. 1992)

In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980)

In re U.S. Fin. Sec. Litig., 75 F.R.D. 702 (SD. Cal. 1977) *rev'd*, 609 F.2d 411 (9th Cir. 1979) *cert. denied*, 466 U.S. 929 (1980)

Ingersol v. Lansing, 51 Hun. 101, 103, 5 N.Y.S. 288 (App. Div. 4th Dept.1889)

JEB Ex Rel TB, 511 U.S.127 (1994)

Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977)

Jones v. U.S., 527 U.S. 373 (1999)

Jorgensen v. York, Inc. Machinery Corp., 160 F.2d 432 (2d Cir. 1947)

Joseph A. Bass Co. v. U.S., 340 F.2d 842, 845 (8th Cir. 1965)

Journal Pub. Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986)

Jurek v. Texas, 428 U.S. 262 (1976)

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)

Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (9th Cir. 1979) *cert. denied,* 447 U.S. 906 (1980)

Lockhart v. McCree, 6 US 162 (1986)

Lydon v. Justice of Boston Municipal Court, 536 F. Supp. 647, 649 (D. Mass), *aff'd*, 698 F.2d 1 (1st Cir. 1982), *rev'd on other grounds*, 104 S.Ct. 1805 (1984)

Marksman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996)

McClesky v. Kemp, 481 U.S. 279, 107 S. Ct. 1756 (1987)

McClesky v. Zant, 580 F.Supp. 338 (ND GA 1984)

McDonald v. Pless, 238 U.S. 264, 268-269 (1915)

Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980)

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 662 (1966)

Moore v. U.S., 429 U.S. 20 (1976)

Morgan v. Illinois, 504 U.S. 719 (1992)

National Labor Relations Board v. Remmington Rand, 94 F.2d 862, 873 (2d Cir. 1938), *cert. denied*, 304 U.S. 576 (1938)

Nixon v. Administrator of General Services, 433 U.S. 425 (1977)

Patton v. U.S., 281 U.S. 276, 50 S.Ct. 253 (1930)

People v. Harlan, 8 P.3d 448 (Colo. Sup. Ct. 2000), *modified and reh'g denied,* 2000 Colo. LEXIS 1125 (Colo. Sup. Ct. 2000), *cert. denied*, 532 U.S. 979 (2001), *post-conviction proceeding*, 54 P.3d 871, 2002 Colo. LEXIS 817 (Colo. Sup. Ct. 2002), *reh'g*

denied, 2002 Colo. LEXIS 847 (Colo. Sup. Ct. Oct. 7, 2002), *post-conviction proceeding*, 109 P.3d 616, 2005 Colo. LEXIS 310 (Colo. Sup. Ct. 2005)

People v. Wadle, 97 P.3d 932 (Colo. Sup. Ct. 2004)

Plummer v. Western Int'l Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981)

Pointer v. U.S., 151 U.S. 396 (1893)

Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) *aff'd*, 434 U.S. 575 (1978)

Pope v. State, 345 S.E.2d 831 (Ga. 1986), *overruled on other grounds by Nash v. State*, 519 S.E.2d 893 (Ga. 1999)

Powers v. Ohio, 499 U.S. 400 (1991)

Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)

Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986)

Proffit v. Florida, 428 U.S. 242 (1976)

Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977)

Rahn v. Junction City Foundry, Inc., 161 F.Supp.2d 1219, 1247 (D. Kan. 2001)

Rake v. U.S., 169 F.2d. 739 (4th Cir. 1948), cert. denied 335 U.S. 826 (1948)

Ramirez v. State, 810 So.2d 836 (Fla. 2001)

Re Express News Corp, 695 F2d 807 (5th Cir. 1985)

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 55 (1980)

Ring v. Arizona, 536 U.S. 584 (2002)

Rosales-Lopez v. U.S., 451 U.S. 182, 191 (1981)

Samuel H. Moss, Inc. v. FK, 148 F2d 378 (2d Cir.) *cert. denied*, 326 U.S. 734 (1945)

Seaboard Lumber Co. v. U.S., 308 F.3d 1283 (Fed. Cir. 2002)

Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966)

Scoglin v. Century Fitness, Inc., 780 F.2d 1316, 1319-1320 (8th Cir. 1985)

Seaboard Lumber Co. v. U.S., 308 F.2d, 1283 (Fed. Cir. 2003)

Simmons v. South Carolina, 512 U.S. 154 (1994)

Singer v. U.S., 380 U.S. 24 (1965)

Singer v. U.S., 396 U.S 531, 538 n.10 (1970)

Smith Kline Beecham Corp. v. Apotex Cor., 247 F.Supp.2d 1011, 1042 (N.D. Ill. 2003)

Spearman v. Wilson, 44 GA 473 (Sup. Ct. 1871)

State v. Bybee, 17 Kan. 462 (1877)

State v. Swart, 20 Media L. Rep. 1703 (Minn.Ct.App. 1992)

State v. White, 142 A.2d 65, 76 (NJ 1997)

Sullivan v. National Football League, 839 F.Supp. 6 (D. Mass 1993)

Swain v. Alabama, 380 U.S. 202 (1965)

Tanner v. U.S., 483 U.S. 107 (1987) *superseded by statute on other grounds, as cited in* U.S. v. Little, 889 F.2d 1367 (5th Cir. 1989)

Turner v. Commonwealth, 364 S.E.2d 483 (Va. 1988)

Turner v. Murray, 476 U.S. 28 (1986)

U.S. v. Arthur Andersen, *LLP*, 374 F.3d 281, 284, 288-292 (5th Cir. 2004), *rev'd*, 544 U.S. 696, 125 S. Ct. 2129 (2004)

U.S. v. Barnes, 604 F.2d 121 (2d Cir. 1979)

U.S. v. Braunstein, 474 F. Supp. 1, 14 (D. N.J. 1979)

U.S. v. Briggs, 291 F.3d 805 (7th Cir. 2002)

U.S. v. Brown, 250 F.3d 907 (5th Cir. 2001)

U.S. v. Bush, 47 F.3d 511 (2d Cir. 1999)

U.S. v. Butt, 753 F.Supp. 44 (D. Mass 1990)

U.S. v. Callahan, 588 F.2d 1078 (5th Cir. 1979)

U.S. v. Cassiere, 4 F.3d 1006 (1st Cir. 1993)

U.S. v. Clark, 943 F.2d. 775, 784 (7th Cir. 1991)

U.S. v. Collins, 226 F.2d 457 (3d Cir. 1999)

U.S. v. Davila, et al, 704 F.2d 749 (5th Cir. 1983)

U.S. v. Dionisio, 410 U.S. 1, 93 S. Ct. 764 (1973)

U.S. v. Doherty, 675 F.Supp. 719 (D. Mass. 1987), *aff'd in part, rev'd in part on other grounds*, 867 F.2d 47 (1st Cir. 1989)

U.S. v. Eagle, 539 F.2d 1166, 1170 (8th Cir. 1976)

U.S. v. Edwards, 39 F.Supp.2d 692, 696-601 (M.D. La. 1999), *aff'd*, 442 F.3d 258 (5th Cir. 2006), *cert. denied*, 126 S.Ct. 2948 (U.S. June 26, 2006)

U.S. v. Feinberg, 89 F.2d 333 (7th Cir. 1999)

U.S. v. Francis, 367 F.2d 805 (8th Cir. 2004)

U.S. v. Franklin, 546 F. Supp. 1133 (N.D. Ind. 1982)

U.S. v. Gabriel, 125 F.2d 89, 94-95 (2d Cir. 1997)

U.S. v. Greene, 998 F.2d 604 (8th Cir. 1993)

U.S. v. Gurney, 558 F.2d 1202 (5th Cir. 1977)

U.S. v. Harrelson, 713 F.2d 1114 (5th Cir. 1983), *cert. denied*, El Paso Times, Inc. v. U.S. Dist. Court for Western Dist., 465 U.S. 1041, 79 L. Ed 714, 104 S.Ct. 1318 (1984)

U.S. v. Henley, 238 F.3d 1111, 1121 (9th Cir. 2002)

U.S. v. Hernandez, 176 F.2d 719 (3d Cir. 1999)

U.S. v. Mara, 410 U.S. 19, 93 S. Ct. 774 (1973)

U.S. v. Milberg Weiss Bershad and Schulman, No. CR 05-587(a) – DDP (C.D. Cal. 2006)

U.S. v. Millan-Colon, 834 F.Supp. 78, 83-86 (S.D.N.Y. 1993)

U.S. v. Panteleakis, 422 F.Supp. 247, 249-50 (D. R.I. 1976)

U.S. v. Polowichak, 783 F.2d 410 (4th Cir. 1986)

U.S. v. Richards, 241 F.3d 335, 343-344 (3rd Cir. 2001)

U.S. v. Rowe, 906 F.2d 654, 656 N. 3 (11th Cir. 1990)

U.S. v. Rutherford, 371 F.3d 634 (9th Cir. 2004)

U.S. v. Sherman, 581 F2d 1358 (9th Cir. 1978)

U.S. v. Tanner, 483 U.S. 107 (1987), *superseded by statute on other grounds*, 18 U.S.C. § 1346 (1988)

U.S. v. United Shoe Machinery Corp., 89 F.Supp. 349 (D. Mass. 1950)

U.S. v. United Shoe Machinery Corp., 110 F.Supp 295 (D. Mass 1953), *aff'd*, 347 U.S. 521 (1954)

U.S. v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967)

Wainright v. Witt, 469 U.S. 412 (1985)

Waller v. Georgia, 467 U.S. 39 (1984)

Whalen v. Roe, 429 U.S. 589, 599 (1977)

Wiser v. People, 732 P.2d 1139 (Colo. Sup. Ct. 1987)

Witherspoon v. Illinois, 391 U.S. 510 (1968)

Zenith Radio Corp v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979) *vacated*, In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980)

CONSTITUTIONS & STATUTES

CALIFORNIA

Cal. Const. art. I, § 16 (Trial By Jury)

Cal. Civ. Proc. Code § 170.5

Cal. Civ. Proc. Code § 170.6

Cal. Civ. Proc. Code § 206 (b)

Cal. Civ. Proc. Code § 237 (West 1996)

Cal. Civ. Proc. Code § 631 (Deerings 2005)

Cal. Evid. Code § 1150

Cal. Penal Code §§ 1089, 1120, 1150 (2005)

CANADA

Constitution Act, 1867, Part I, ch. 11 (U.K.), as reprinted in R.S.C. ch 11, schedule B (1982)

Canada Criminal Code, R.S.C., c. 46, § 2-22, as amended (2003) (1985)

Canada Criminal Code, R.S.C., c. 46, § 139 (2) (1985)

Canada Criminal Code, R.S.C., c. 46, § 536 (1985)

Canada Criminal Code, R.S.C., c. 46, § 538 (1985)

Canada Criminal Code, R.S.C., c. 46, § 561 (1985)

Canada Criminal Code, R.S.C., c. 46, § 568 (1985)

Canada Criminal Code, R.S.C., c. 46, § 628 (1985)

Canada Criminal Code, R.S.C., c. 46, § 629 (1985)

Canada Criminal Code, R.S.C., c. 46, § 633 (1985)

Canada Criminal Code R.S.C., c. 46, §§ 634, 641 (1985)

Canada Criminal Code, R.S.C., c. 46, § 638 (1985)

Canada Criminal Code, R.S.C., c. 46, § 639 (1985)

Canada Criminal Code, R.S.C., c. 46, § 640 (1985)

Canada Criminal Code, R.S.C., c. 46, § 644 (1985)

Canada Criminal Code, R.S.C., c. 46, § 649 (1985)

Canada Criminal Code, R.S.C., c. 46, § 686 (1) (a) (i) (1985)

COLORADO

Colo. R. Civ. P. 47 (a) (4), 347 (a) (4)

Colo. R. Crim. P. 24 (a) (4)

Colo. Rev. Stat. § 13.71.136 (1999)

ENGLAND AND WALES

Bail Act, 1976, c. 63, sch. 1 (Eng.)

Civil Evidence Act, 1995, c. 38, § 2

Civil Evidence Act, 1995, c. 38, §§ 1, 4 (1) (2)

Civil Procedure Rules, 1998, c. 35, § 35.7

Civil Procedure Rules, 1998, c. 35, § 22.4

Contempt of Court Act, 1981, c. 49, § 8

Criminal Justice Act, 1967, c. 80, § 3, now Juries Act, 1974

Criminal Justice Act, 1967, c. 80, § 13, now Juries Act, 1974, c. 23, § 17

Criminal Justice Act, 1987, c. 38, § 2

Criminal Justice Act, 1988, c. 33, § 118 (1)

Criminal Justice Act, 1988, c. 33, § 530

Criminal Justice Act, 2003, c. 44, § 43

Criminal Justice Act, 2003, c. 44, § 101 a-b

Criminal Justice Act, 2003, c. 44, § 116

Criminal Justice Act, 2003, c. 44, § 117

Criminal Justice Act, 2003, c. 44, § 124 (Credibility)

Criminal Justice Act, 2003, c. 44, § 321

Criminal Justice Act, 2003, c. 44, § 34

Criminal Justice Act, 2003, c. 44, §§ 98, 99

Criminal Justice Act, 2003, c. 44, §§ 114-116

Criminal Justice Act, 2003, c. 7, § 4 [1] (a) - (b)

Criminal Justice Act, 2003, c. 7, § 43 (4) (5)

Criminal Justice & Public Order Act, 1994, c. 33, §§ 34-38, 40

Criminal Law Act, 1977, c. 45, § 49

Criminal Procedure and Investigations Act, 1996, c. 25, §§ 28-38, & 49

Criminal Procedure Rules, R. 224

Emergency Provisions (Northern Ireland) Act, 1973

Emergency Provisions (Northern Ireland) Act, 1991, § 10 (5)

Fraud (Trials without a Jury) Bill, 2006, Bill [6] of 2006-07] (Gr. Brit.)

Human Rights Act, 1998, c. 42, § 3 (Eng.)

Magistrates' Courts Act, 1980, c. 43, § 19

Magistrates' Courts Act, 1980, c. 43, § 42 (1)

Public and Criminal Evidence Act, 1984

The Constitution Act, 1867, §§ 91, 92 (14) (The British North America Act of the Westminster Parliament)

The Juries Act, 1974, c. 23, § 9 (12)

Youth Justice and Criminal Evidence Act, 1999, c. 23, § 53 (4)

EUROPEAN CONVENTION OF HUMAN RIGHTS

European Convention Article 6

NEW YORK STATE

N.Y. C.P.L.R. 320.205 (McKinney 2007)2007)

N.Y. C.P.L.R. 4101 and 4102 (McKinney 2007)2007)

N.Y. C.P.L.R. 4212 (McKinney 2007)

N.Y. Crim. Proc. Law § 190.254(a) (McKinney 2007)

N.Y. Crim. Proc. Law §§ 260.10, 320.10 (McKinney 2007)

N.Y. Crim. Proc. Law § 270.15

N.Y. Crim. Proc. Law § 270.16 (McKinney 2007)

N.Y. Crim. Proc. Law § 270.35 (McKinney 2007)

N.Y. Crim. Proc. Law § 290.10 (McKinney 2007)

N.Y. Crim. Proc. Law § 320.10 (McKinney 2007)
N.Y. Crim. Proc. Law § 400.27 (McKinney 2007)

N.Y. Jud. Law § 508 (McKinney 2007)

N.Y. Jud. Law § 509 (McKinney 2007)

N.Y. Jud. Law § 510 (McKinney 2007)

N.Y. Penal Law § 20.20 (McKinney 2007)

N.Y. Penal Law § 125.27 (McKinney 2007)

Unif. R. N.Y. Trial Courts § 200.11 (a)-(c) (New York Rules of Courts, McKinney 2007)

TEXAS

Tex. Crim. P. Code Ann. § 35-29 (West Supp. 1997)

Tex. Crim. P. Code Art. 37.0171, § 2 [b] [1]

U.S.A.

U.S. Const. Amend. V

U.S. Const. Amend. VI

U.S. Const. amend. VIII

U.S. Const. amend. XI

U.S. Const. amend. XIV

U.S. Const. amend. XIV, § 1

15 U.S.C.A. §§ 1503 (d), 1505

18 U.S.C.A. § 1512

28 U.S.C.A. § 144

28 U.S.C.A. §§ 144, 455

28 U.S.C.A. § 455 (a)

Fed.R.Evid. 606 (b) Advisory Committee Notes (1972)

Model Code of Judicial Conduct R. 2.12

Model Penal Code § 2.07 (5), Appendix C

GOVERNMENT REFERENCES

CALIFORNIA

Judicial Council of California, Administrative Office of the Courts Court Statistics Report Statewide Caseload Trends 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, *available at* http://www.courtinfo.ca.gov/reference/3_stats.htm

CANADA

Law Reform Commission, Working Paper ch. 2 at 118-119 (Canada: Law Reform Commission)

Canadian Judicial Council, Model Jury Instructions (2004), *available at* http://www.cjc-ccm.gc.ca/article.asp?id=2337

Juristat, Canadian Centre for Justice Statistics, Statistics Canada, Adult Criminal Court Statistics Catalog No. 85-002 Exp. Vol. 24, No. 12, at 9 (2003-04), *available at* http://www.statcan.ca/english/freepub/85-002-XIE/0120485-002-XIE.pdf

Jury Service in Victoria, *available at* http://www.parliament.vic.gov.au/lawreform/jury/default.htm

ENGLAND AND WALES

416 Parl. Deb., H.L. (5th ser.) (1981) 371

Parl. Deb., H.C. (5th ser.) (1987) standing Comm. D., co/411 [3 March 1987]

651 Parl. Deb., H.L. (5th ser.) (2003) 768-823

651 Parl. Deb., H.L. (5th ser.) (2003) 776

651 Parl. Deb. H.L. (5th ser.) (2003) 779-780

651 Parl. Deb., H.L. (5th ser.) (2003) 781-782

Lord Justice Robin Auld, Review of the Criminal Courts in England and Wales ch. 11 ¶ 104, 282 ¶ 4.31 (Sept. 2001), *available at* http://www.criminal-courts-review.org.uk

Control and Management of Heavy Fraud and Other Complex Criminal Cases – A Protocol Issued by The Lord Chief Justice of England and Wales, [2005] All E.R. (D) 386 (Mar)

The Criminal Courts Review Report – Comments from Lawyers Organizations, Department for Constitutional Affairs, Ch. 5 Juries, ¶46, *available at* http://www.dca.gov.uk/criminal/auldcom/lorg/lorgindex.htm

Department for Constitutional Affairs, *The Objectives and Content of the First Criminal Procedure Rules*, 3/22/05, Part I, see also http://www.justice.gov.uk/criminal/procrules_fin/index.htm (Oct. 4, 2007)

Fraud Trial Comm. Report 1986

Fraud (Trials without a Jury) Bill, 2006, Bill [6] of 2006-07 (Gr. Brit.), which is pending as of this writing, *available at* http://www.publications.parliament.uk/pa/pabills/200607/fraud_trials_without_a_jury.htm

Lord Goldsmith, News Release: Attorney General Welcomes Review Report Of Hmcps Inspector Into Jubilee Line Case, Office of the Attorney General, June 27, 2006, *available at* http://www.attorneygeneral.gov.uk/attachments/ag_press_release_Jubilee_Line_case_27_06_06.doc

Jury research and Impropriety CP04/05

Miriam Peck, The Frauds (Trials Without a Jury) Bill 2006-07, Research Paper 06/57 Home Affairs Section (House of Commons Library 2006), *available at* http://www.commonsleader.gov.uk/output/page1757.asp

Northern Ireland (Emergency Provisions) Act, 1973

Viscount Runciman, Chairperson, The Royal Commission on Criminal Justice ch.8, ¶¶ 26-28 (HMSO 1993)

Serious Fraud Office, Annual Reports 2002-2003, 2003-2004, 2004-2005, 2005-2006, *available at* http://www.sfo.gov.uk/publications/annual_report.asp

United Kingdom Attorney General, Fraud Review: Final Report 204-205 (2006)

Stephen Wooler, Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case, June 27, 2006 (HMCPS1), *available at* http://www.hmcpsi.gov.uk/reports/JubileeLineReponly.pdf

The United Kingdom Parliament, Explanatory Notes: Frauds Trial Without a Jury Bill as Introduced in the House of Commons on 16th November, 2006

NEW YORK STATE

1 NY PJI3d 1:25A, at 46-48 (2005)

N.Y. Office of Court Admin., 2001-2005

N.Y. Office of Court Admin., Jury Trial Innovations in New York State: A Practical Guide For Trial Judges 4-5 (2005)

Unif. R. N.Y. Trial Courts § 200.11 (a)-(c) (New York Rules of Courts, McKinney 2006)

U.S.A.

S. Jud. Comm., *Analysis of S. 1200, 102d Cong. (1991)* (1991-92 Reg. Session)

U.S. Dept. of Justice Statistics, Bureau of Justice Statistics, State Court Organization, pp. 278-281 (1998)

U.S. Dept. of Justice, Bureau of Juror Statistics, State Court Organization, pp. 273-276 (1998)

U.S. Dept. of Justice, Bureau of Justice Statistics, State Court Organization, 263-272 (1998)

U.S. Dept. of Justice, Bureau of Justice Statistics, State Court Organization, pp. 273-276 (1998)

Bibliography

Jeffrey Abramson, We, The Jury, 122-123 (1994 Basic Books)

Abraham Abramousky, *The Choices Surrounding Use of Anonymous Juries*, N.Y. L.J., Sept. 11, 1993 at 3

Abraham Abramousky and Johnathan I. Edelstein, *Anonymous Juries: In Exigent Circumstances Only*, 13 St. John J.L. Comm. 457 (1999)

James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 Pace L. Rev. 41 (1996)

James R. Acker and Charles S. Lanier, *Law, Discretion and the Capital Jury: Death Penalty Statues and Proposals for Reform,* 32 *Crim L. Bull.* 1134, 1173-1178 (1996)

Kenneth D. Ackerman & Boss Tweed, The Rise and Fall of the Corrupt Pol. Who Conceived the Soul of Modern New York (1st Carroll & Graf Trade Pbk. ed., Carroll & Graf Publishers 2005)

Dale R. Agathe, Annotation, *Propriety of Attorneys Communication After Trial*, 19 A.L.R.4th 1209 (2000)

Peter Alldridge, *Recognizing Novel Scientific Techniques: DNA As a Test Case*, [1992] Crim L. R. 687

Elizabeth K. Ainslie, *Indicting Corporations Revisited: The Lessons of the Arthur Andersen Prosecution*, 43 Am. Crim L. R. 107 (2006)

American College of Trial Lawyers, Elizabeth K. Ainslie, Chair, *Indicting Corporations Revisited: The Lessons of The Arthur Anderson Prosecution* (2004)

Philip Anisman & Allen Linden, The Media, The Courts, and the Charter (Allen Manson ed., Carswell 1986)

Frank Armstrong, *Jury Selection – Challenge for Cause*, 23 C.R.N.S. 13 (1973)

Andrew Ashworth, The Criminal Process: An Evaluative Study (2nd ed., Oxford University Press 1998)

Andrew Ashworth & Michael Redmayne, The Criminal Process (3rd ed., Oxford University Press 2005)

Associated Press, *Conviction of Ex World Com chief is Upheld*, N.Y. Times, July 29, 2006, at C2

Associated Press, *Jurors in Black Case Speak Out,* The Herald News Online (Jul. 15, 2007) http://www.suburbanchicagonews.com/heraldnews/news/469028,4_1_JO15_BLACK_S1.article

Lord Justice Robin Auld, Review of the Criminal Courts in England and Wales ch. 11 ¶ 104, 282 ¶ 4.31 (Sept. 2001), *available at* http://www.criminal-courts-review.org.uk

Vikas Bajaj & Kyle Whitmire, *I Didn't Know, Did Not Sway Houston Jury*, N.Y. Times, May 26, 2006, at C5

Vikas Bajaj, *A 2nd Criminal Trial Begins for Former Enron Chief*, N.Y. Times, May 19, 2006, at C4

David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *The Use of Peremptory Challenges in Capital Murder Case: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3, 10 (2001)

David C. Baldus, George Woodworth, David Zuckerman, Neil Alan Weiner, & Barbara Broffitt, *Racial Discrimination and the Death Penalty in the Post-Furman Era: an Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998)

David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty – A Legal and Empirical Analysis (Eastern U. Press 1990)

S.H. Bailey, *The Contempt of Court Act* [1981], 45 Mod. L.Rev. 301 [1982] 310-31

Alexi Barrionuevo, *2 Enron Chiefs are Convicted In Fraud and Conspiracy Trial*, N.Y. Times, May 26, 2006, at A1

Alexi Barrionuevo, *Enron Prosecutors Aim to Rattle, Not Be Rattled*, N.Y. Times, April 13, 2006, at C1

Alexi Barrionuevo and Kurt Eichenwald, *The Enron Case that Almost Wasn't*, N.Y. Times, June 4, 2006, at A1

Alexi Barrionuevo, *Ex-Enron Chief Defends Shift of Contracts*, N.Y. Times, April 13, 2006, at C1

BBC News, *£60m Fraud Case Collapse Probed*, March 23, 2005, *available at*, http://news.bbc.co.uk

Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming: Aggravation Requires Death and Mitigation is No Excuse,* 66 Brook L. Rev. 1032 (2001)

Laurie B. Berberich, *Jury Instructions Regarding Deadlock in Capital Sentencing,* 29 Hof. L. Rev. 1301, 1326 (2001)

Susan Berger, *A Spectator's View of the Weeks Courtroom Happenings*, (July 16, 2007) http://www.cbc.com/news/background/blackcontad/fromthe-inside07016.html

David E. Bernstein, *Junk Science in the United States and the Commonwealth*, 21 Yale J. Int'l L. 123 (1996)

Andrew T. Berry, *Selecting Jurors,* 24 Litigation 8 (1997)

Lord Bingham of Cornhill, The Business of Judging 4 (Oxford: Oxford University Press 2000)

Bert Black, *A Unified Theory of Scientific Evidence*, 56 Fordham L. Rev. 595 (1988)

Blunkett Furious as Lords Throw Out Reform of the Jury Trial, The Guardian, 20 Nov. 2003

E. Richard Bodyfelt, Editor in Chief et al *Disqualification of Judges for Prejudice or Bias – Common Law Evolution Current Status and the Oregon Experience*, 48 Oregon L. Rev. 311 (1969)

Sally Lloyd-Bostock, Report On Interviews With Jurors In The Jubilee Line Case (2007), *available at*, http://www.hmcpsi.gov.uk/reports/JLJuryIntsRep.pdf

Sally Lloyd-Bostock, *The Effects on Juries of Hearing About the Defendant's Previous Criminal Record: A Simulation Study*, [2000] Crim L. R. 734

Sally Lloyd-Bostock, T*he Jubilee Line Jurors: Does their Experience Strengthen the Argument for Judge-only Trials in Long and Complex Cases?*, 2007 Crim L. R. 255

Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the Little Parliament, Juries and Jury Reform in England and Wales*, 62 Law & Contemp. Probs. 7 (Spring 1999)

Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury, in,* World Jury Systems (Neil Vidmar ed., Oxford 2000)

William J. Bowers & Benjamin Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,* 77 Tex. L. Rev. 605, 677-678 (1999)

William J. Bowers, Marla Sandys & William Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors Predispositions, Guilt-Trial Experience, and Premature Decision Making,* 83 Cornell L. Rev. 1476, 1482 n. 17 (1997-1998)

William J. Bowers, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171 (2001)

William J. Bowers, Margaret Vandiver, and Patricia Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer,* 22 Am. J. Crim. L. 77 (1994-95)

Kevin Boyle, Human Rights and the Northern Ireland Emergency in Human Rights in Criminal Procedure, 140 (John A. Andrews ed., Kluwer Academic Publishers 1982)

William D. Bremer, *Propriety of Using Anonymous Juries in State Criminal Cases*, 60 A.L.R.5th 39 (2005)

L. Bridges et al., Ethnic Minority Defendants and the Right to Elect a Jury Trial 18 (London: Commission on Racial Equality 2000)

Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases,* 73 Bos. L. Rev. 759 (1995)

Stephen B. Bright, *Elected Judges and the Death Penalty in Texas*, 78 Tex. L. Rev. 1805, 1818 (2000)

Steven Brill, *Inside the Jury Room at the Washington Post Libel Trial*, Am. Law, Nov. 1982 at 1

Rebecca Bromley, *Jury Leniency in Drinking and Driving Cases, Has it Changed? 1958 Versus 1993*, 20 Law & Psych. Rev. 27 (1996)

R. Blake Brown, *Challenges for Cause, Stand Asides, and Peremptory Challenges in the Nineteenth Century*, 38 Osgoode Hall L.J. 453 (2000)

Tania M. Bubela, *Expert Evidence: The Ethical Responsibility of the Legal Profession*, 41 Alberta L. Rev. 853, 869 (2004)

Business Briefs, *The Fallout of Lawsuit*, N.Y. Times, May 20, 2006, at C2

Edward G. Burg, *Meeting the Challenge: Rethinking Judicial Qualification*, 69 Cal. L. Rev. 1445 (1981)

Paul Carr & Adrian Turner, Stone's Justice's Manual ¶¶ 1-39 – 1-45 (17th ed., London: Butterworths Law 1996)

Case Comments – *Voir Dire Limitations Intended to Protect potential Jurors Safety and Privacy,* 55 Notre Dame L. Rev. 281 (1979)

Robert P. Charrow & Vida R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979)

Robert J. Christians, *VOIR DIRE – Defendants Are Not Deprived of the Intelligent Use of Peremptories by Voir Dire Restrictions Intended to Protect Potential Jurors Safety and Privacy*, 55 Notre Dame L. Rev. 281 (1979)

Citizen's Jury Project, Spring 2003, Report on Juror Concerns, December 1, 2002 – March 31, 2003

City and Financial, *The Conduct of Fraud Trials: New Propsals*, March 23, 2006, *available at* http://www.cityandfinancial.com

Kim Clark, U.S. News & World Report, *Home/Money* 4/24/06

Edward W. Cleary, McCormick on Evidence §§ 60, 137, 1014 (2d ed., West, 1972)

Edward W. Cleary, McCormick on Evidence § 293 (4th ed., West, 1992)

Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants Advantage*, 3 Am. L. & Econ. Rev. 125 (2001)

Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 Cornell L. Rev. 1124, 1153 (1992)

John Cooper, *Excessive Strain Falls On Jury Members*, The Lawyer, May 8, 2000

Conviction of Ex World Com Chief Is Upheld, N.Y. Times, Jul. 29, 2006 at C1,C3

Corporate Injustice, Editorial, Wall St. J., April 6, 2006 at A14

Rita Cosby program, MSNBC (an investigative television news show)

Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification Jurors Predisposition to Convict and on the Quality of Deliberations*, 8 Law & Hum. Behav. 53 (1984)

Julie Cresswell, *U.S. Indictment for Big Law Firm In Class Actions*, N.Y. Times, May 19, 2006

Collette Daiute & Cynthia Lightfoot, Narrative Analysis Studying the Development of Individuals in Society (Collette Daiute & Cynthia Lightfoot eds., Sage Publications 2004)

Gillian Daly and Rosemary Pattendon, *Racial Bias and the English Criminal Trial Jury*, 64 Cambridge L.J. 678 (2005)

Mirjan Damaška, Atomistic and Holistic Evaluation of Evidence (New Haven: Yale University Press 1990)

Mirjan Damaška, Evidence Law Adrift (New Haven: Yale University Press 1997)

Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 507, 554 (1973)

Penny Darbyshire, *For the New Lord Chancellor – some Causes for Concern About Magistrates*, [1997] Crim. L.R. 681, 869

Penny Darbyshire, Andy Maughn & Angus Stewart, What Can the English Legal System Learn from Jury Research Published up to 2001? 45-62 (Kingston upon Thames, UK: Kingston Business School/Kingston Law School, Occasional Paper Series 49 2002), *available at* http://www.kingston.ac.uk/~ku00596/elsres01.pdf

Kenneth Culp Davis, *An Approach to Rules of Evidence for Non-Jury Cases*, 50 A.B.A.J. 723 (1965)

Kenneth Culp Davis, *Hearsay in Non-Jury Cases*, 83 Harv. L. Rev. 1362, 1368 (1970)

John Philip Dawson, A History of Lay Judges (Cambridge, Mass.: The Lawbook Exchange LTD 1960)

Michelle M. Dempsey, *The Use of Expert Witness Testimony in the Prosecution of Domestic Violence*, The Crown Prosecution Service (2004)

Lord Patrick Devlin, Hamlyn Lectures on Trial By Jury (London: Stevens and Sons Limited 1956)

Department for Constitutional Affairs, *The Objectives and Content of the First Criminal Procedure Rules*, 3/22/05, Part I, *available at* http://www.justice.gov.uk/criminal/procrules_fin/index.htm (Oct. 4, 2007)

Shari Seidman Diamond, *Juror Questions At Trial – In Principle and In Fact*, 78 N.Y. St. B.A. J. 22 (Oct. 2006)

A.N. Doob & H.M. Kirschenbaum, *Some Empirical Evidence on the Effect of s.12 of the Canada Evidence Act Upon an Accused*; 15 Crim. L. Q. 88, 88-96 (1972)

Sean Doran, *Descent to Averness*, 139 New L.J. 1147 (1989)

Sean Doran & John D. Jackson, *The Case for Jury Waiver*, 1997 Crim L. R. 155 (1997)

Sean Doran & John D. Jackson, The Judicial Role In Criminal Proceedings (Sean Doran & John D. Jackson, eds., Oxford: Hart 2000)

Sean Doran, John D. Jackson, & Michael L. Siegel, *Rethinking Adversariness in Non-Jury Criminal Trials*, 23 Am. J. Crim. L. 1, 27 n.8 (1999)

William L. Dwyer, In The Hands of The People (New York: St. Martin's Press 2002)

Kurt Eichenwald, Conspiracy of Fools ch. 21 (Broadway, Inc. 2005)

Kurt Eichenwald & Alexi Barrionuevo, *Tough Justice for Executives in Enron Era*, N.Y. Times, May 27, 2006

Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital* Cases, 79 Cornell L. Rev. 1 (1993-1994)

Theodore Eisenberg, Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, Thomas G. Munsterman, Stewart J. Schwab, & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalvin and Zeisel's The American Jury*, 2 J. Emp. Legal Stud. 171 (2005)

Sean Enright, *Unlocking the Jury Room*, 139 New L.J. 655 (1989)

Enron, N.Y. Times, http://www.nytimes.com/

E.G. Ewaschuk, *Criminal Pleadings and Practice In Canada*, (2nd ed., Aurora, Ont.: Canada Law Book 1987)

Peter Ferguson, *Whistleblowing Jurors*, [2004] 154 New L.J. 370

James Fife, *Restarting Criminal Proceedings After Restoration of Defendant's Competence*, 27 T. Jefferson L. Rev. 93 (2004)

Mark Findlay, *Juror Comprehension and Complexity Strategies to Enhance Understanding*, 41 Brit. J. Criminal (2001) 56, 58

Benjamin Fleury-Steiner, Jurors Stories of Death: How America's Death Penalty Invests in Inequity (University of Michigan Press 2004)

Matthew Forbes, *Juries and Jurors: Jurors on Trial: Constitutional Right versus Judicial Burden: An Analysis of Jury Effectiveness and Alternative Methods for Deciding Cases*, 48 Okla L. Rev. 563 (1995)

Jerome Frank, Law and The Modern Mind 186 (New York: Anchor Books 6th ed. 1963) (1930)

John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605 (1947)

The Fraud Review – The Final Report, Legal Secretariat of the Law Officers, July 2006, http://www.lslo.gov.uk/pdf/FraudReview.pdf

M.D.A. Freeman, *The Jury on Trial*, 34 Current Legal Probs. 65 (1981)

M.L. Friedland, *Comments–Commentaries*, 47 Canadian Bar Rev. 656 (1969)

Bruce W. Frier, The Rise of the Roman Jurists: Studies in Cicero's "Pro Caecina" (Princeton, NJ: Princeton University Press 1985)

Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998)

Gary Gately, *Man Convicted in Costly Maryland Arsons*, N.Y. Times, Sept. 3, 2005 at A11

Paul C. Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L.J. 671 (1988)

Henry Glick, *The Promise and Performance of the Missouri Plan*, 32 U. Miami L. Rev. 509 (1979)

James Gobert, Justice, Democracy, and the Jury (Brookfield, Vt.: Ashgate Publishing Co. 1998)

Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Post Verdict Interviews*, 6 Ill. L. Rev. 295 (1993)

Michael H. Graham, Handbook of Federal Evidence 83-89 pocket part (5th ed., West Group Publishing 2005)

Christopher Granger, The Criminal Jury Trial in Canada (2nd ed., Carswell 1996)

S.C. Greer & A. White, Abolishing the Diplock Courts: The Case for Restoring Jury Trial to Scheduled Offenses in Northern Ireland (London: Cabden Trust 1986)

Steven Greer, *Miscarriages of Justice Reconsidered*, 57 Mod. L. Rev. 58, 71-72 (1994)

Samuel Gross, *Lost Lives: Miscarriage of Justice in Capital Cases*, 61 Law & Contemp. Probs. 125 (1998)

Samuel R. Gross, *Public Opinion on the Death Penalty*, 83 Cornell L. Rev. 1448 (1998)

Samuel R. Gross & Robert Mauro, Death & Discrimination: Racial Disparities in Capital Sentencing (Northeastern Community Press 1989)

Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 68 Cornell L. Rev. 777 (2001)

Craig Haney, *On the Selection of Capital Juries - The Biasing Effects of the Death-Qualification Process*, 8 Law & Hum. Behav. 121 (1984)

Paula L. Hannaford, Valerie P. Hans, & G. Thomas Munsterman, *How Much Justice Hangs in the Balance*, 83 Judicature 59 (1999)

Paula Hannaford, *Safeguarding Juror Privacy A New Framework for Court Policies and Procedures*, 85 Judicature 18 (2001)

Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?*, The National Center for State Courts (2002)

Valarie Hans, Business on Trial (2000 Yale University Press) 216-218

Valerie P. Hans & A.N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L. Q. 235 (1975)

Valerie P. Hans & Neil Vidmar, Judging the Jury (New York Plenium Press 1986)

Valerie Hans & Neil Vidmar, *The American Jury at Twenty-Five Years*, 16 Law & Soc. Inquiry 1323 (1991)

Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 Crim. L. Bull. 33 (2003)

Valerie P. Hans & Anthony V. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 Crim. L. Q. 235 (1976)

Valerie P. Hans, David H. Kaye, Judge B. Michael Dann, Erin J. Farley, and Stephanie Albertson, *Science in the Jury Box: Jurors' Views and Understanding of Mitochondrial DNA Evidence*, p. 34, Cornell Law School Research Paper No. 07-021. http://ssrn.com/abstract=1025582

R. Hastie, S. Penrod & N. Pennington, Inside the Jury 135-137 (Harvard U. Press 1983)

Douglas Hay, The Class Composition of the Palladium of Liberty, in Twelve Good Men and True: The Criminal Trial Jury in England 1200-1800 (I. Cockburn & Thomas A. Green eds., Princeton U. Press 1998)

C. Heddernan & D. Moxon, Magistrates or Crown Court? Mode of Trial Decisions and Sentencing, (London: HMSO 1992)

Judith Heinz, *Peremptory Challenges in Criminal Cases: A Comparison of Regulation in the United States, England and Canada*, 16 Loy. L.A. Int'l & Comp. L. Rev. 201, 224 (1990-91)

Michael Heise, *Criminal Case Complexity: An Empirical Perspective*, 1 J. Empirical Legal Studies 331 (2004)

Virginia E. Hench, *I'll be the Judge – I'll be the Jury, Review of John Jackson and Sean Doran, Judge Without Jury: Diplock Trials in the Adversary System*, H-Law, H-Net Reviews, May 1997, http://www.h-net.org/reviews/showrev.cgi?path=27414868966685

Andrew Herrmans, *Jury 'Hearts Went Out' To 'St. Mark'*, July 16, 2007, *available at*, http://www.suntimes.com/business/hollinger/469858,CST-NWS-conrad16.article

Larry Heuer & Steven Penrod, *Trial Complexity, A Field Investigation of Its Meaning and Its Effects*, 18 Law & Hum. Behav. 29 (1994)

David C. Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. Kan. L. Rev. 255 (1981-1982)

Gerard Hogan & Clive Walker, Political Violence and the Law in Ireland 107 (Manchester University Press 1989)

Jessica Holroyd, *Judging the Jury*, 155 New L.J. 398 (March 18, 2005)

T.M. Honess, M. Levi, & E.A. Charman, *Juror Competence in Serious Frauds Since Roskill: A Research-based Assessment*, 11 J. Financial Crime 17 (2003)

T.M. Honess, M. Levi, & E.A. Charman, *Juror Competence in Processing Complex Information: Implications from A Simulation of the Maxwell Trial*, [1998] Crim L. R. 763

William W. Hood, III. *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L. Rev. 1605 (1989)

Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom (New York: Basic Books 1993)

John D. Jackson & Sean Doran, *Miscarriages of Justice: The Role of the Court Appeal in Northern Ireland*, Standing Advisory Commission on Human Rights, Seventeenth Report, 275-80, n. 205 (1992)

John D. Jackson, *Paradoxes of Lay and Professional Decision Making in Common Law Criminal Systems*, 72 Revue Internationale de droit Pénal 579, #13 (2001)

John D. Jackson, The Impact of Human Rights on Judicial Decision Making, *in*, Sean Doran & John D. Jackson, The Judicial Role In Criminal Proceedings 118-119 (Sean Doran & John D. Jackson eds.,Oxford: Hart 2000)

John Jackson & Sean Doran, *Diplock and the Presumption Against Jury Trial: A Critique*, 1992 Crim. L. R. 755 (1992)

John Jackson & Sean Doran, Judge Without Jury: Diplock Trials in The Adversary System (Oxford: Oxford University Press 1995)

Jointer, Non-Jury Trials, in Seminars for Newly Appointed United States District Judges, 1973-75, 305, 309 (Federal Judicial Center ed. 1976)

Ian Walker, *Plea Bargaining – The Way Forward?*, (Russell Jones, & Walker 2006), *available at* http://www.rjw.co/uk/library/articles/pleabargaining

Robert F. Julian, *Judicial Perspectives on the Conduct of Serious Fraud Trials*, [2007] Crim. L. R. 751

Serena Kafker, *The Defendant's Right to An Impartial Jury and the Rights of Prospective Jurors*, 48 U. Cinn. L. Rev. 985 (1979)

Harry Kalven Jr. & Hans Zeisel, *The American Jury*, (Boston: Little Brown 1966)

Stanley M. Kaplan & Carolyn Winget, *Occupational Hazards of Jury Duty*, 20 Bull. Am. Acad. Psychiatry and Law 325 (1992)

Adrian Keane, The Modern Law of Evidence 572-583 (6th ed., Oxford University Press 2006)

Denis Kennan, Smith & Kennan's English Law (14th ed., Pearson Education Ltd. 2004)

James E. Kelly, *Addressing Juror Stress: A Trial Judge's Perspective*, 43 Drake L. Rev. 97 (1993-1995)

Nancy J. King, *Nameless Justice: The Case for the Routine Use of Anonymous Juries in Criminal Trials*, 49 Vand. L. Rev. 123 (1996)

Nancy Jean King, *The American Criminal Jury*, 62 Law and Contemp. Probs. 41 (1999)

Kenneth S. Klein and Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 Wis. L. Rev. 553 (1999)

Melissa Klein, *Guilty Verdict Draws Mixed Reaction*, Accounting Today, July 8, 2002 at 1

Natasha Korecki, Abdon Pallasch, Mark J. Konkol and Steve R. Warmbir, *Guilty of all charges: Ex-governor glares at jury, vows to appeal*, Chicago Sun-Times, Apr. 16, 2006, *available at*, http://www.suntimes.com/

Elissa Kraus, *The Latest In Juries*, 78 N.Y. St. B.J. 16 (Oct. 2006)

Rocco LaDuca, *Judge Finds Utican Guilty in Fatal Crash – Was Driving Drunk in Accident that Killed 22 Year Old Woman*, Utica Observer Dispatch, May 26, 2006 at B1

John H. Langbein, The Origins of Adversary Criminal Trials, 321 (2003 Oxford)

John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823 (1985)

The Law Society, *Preserve The Right to Jury Trial – Law Society Briefing – Law Reform and Legal Policy* (July 6, 2005), *available at*, http://www.lawsociety.org.uk

The Law Society, *Don't Abolish Juries in Frauds Trials* (Nov. 25, 2003), *available at*, http://www.lawsociety.org.uk

The Law Society, *Government Climbs Down Over Abolishing Juries in Fraud Trials* (Mar. 14, 2006), *available at*, http://www.lawsociety.org.uk

Legal Secretariat of the Law Officers, *The Fraud Review – The Final Report*, July 2006, *available at*, http://www.lslo.gov.uk/pdf/FraudReview.pdf

Jim Lehrer, The Jim Lehrer News Hour Report, Public Broadcasting System, May 25, 2006

Jim Lehrer, The Jim Lehrer News Hour Report, Public Broadcasting System, May 23, 2006

Andrew D. Leipold, *Why are Federal Judges So Acquittal Prone?*, 83 Wash. U. L. Q. 151 (2005)

Richard O. Lempert & Stephen A. Saltzburg, A Modern Approach to Evidence 523 (2nd ed. 1982)

John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237 (1987)

Howard G. Leventhal & Budd G. Goodman, Charges to the Jury and Requests to Charge in a Criminal Case in New York (IL: Callaghan 1988)

Michael Levi, *Blaming the Jury: Frauds on Trial*, 10 J. L. Soc'y 257 (1983)

Michael Levi, *The Investigation, Prosecution and Trial of Serious Fraud*, Royal Commission on Criminal Justice Research Study No. 14, Home Office London (HMSO Books 1993)

Peter Lichtman, Judge of Superior Court, Los Angeles County (December, 2005)

James S. Liebman, Jeffrey Fagan and Valerie West, *Broken System: Error Rates in Capital Cases*, 1973-1995 http://www.thejusticeproject.org (2000)

James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000)

Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 71-72 nn.65-67 (2001)

P. Brad Limpert, *Beyond the Rule in Mohan: A New Model for Assessing the reliability of Scientific Evidence*, 54 U.T. Fac. L. Rev. 65 (1996)

Anthony Lin, In Brief, N.Y. L.J. July 31, 2006, at 1

Paul M. Lisnek, The Hidden Jury: And Other Hidden Tactics Lawyers Use To Win 23-26 (Sourcebooks 2003)

Daniel M. Livingston, *Pre Dispute Jury Waivers After Grafton Partners: Pretrial Waiver of the Jury Just Became More Difficult in California*, 47 Orange County Lawyer 38 (2005)

Stephen Lofthouse, *The Trials of a U.K. Juryman*, 142 New L.J. 561 (1992)

James Lumley, *U.K. Plans to Try Complex Fraud Cases Without Juries* (update 2) (June 21, 2005), *available at*, http://www.bloomberg.com

Thomas Lundy, *Jury Instruction Corner: Propriety of Permitting Jurors to Submit Questions for Witnesses: Instructional Safeguards to Consider If Juror Authored Questions are Allowed*, 26 Champion 48 (2002)

CC.F. Mann, *The Formulization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. Rev. 443 (1984)

Allan Manson, Freedom of the press and juries, prisons and prisoners. 355-357 In Philip Anisman & Allen M. Linden (Eds.), The media, the courts and the Charter (Toronto: Carswell 1986)

James Marshall, Law and Psychology in Conflict, 59-100 (Indianapolis: Bobbs-Merrill Co. 1980)

Michael M. Martin, Daniel J. Capra, & Faust F. Rossi, New York Evidence Handbook 608-109 (Aspen 1997)

R. Mathews, L. Hancock & D. Briggs, Jurors Perceptions, Understanding, Confidence, and Satisfaction in the Jury System – A Study in Six Courts Home Office Outline Report No. 05/04 at 4 (Research and Development Directorate of the Home Office 2004), *available at* http://www.homeoffice.gov.uk/rds/pdfs2/rdsolr0504.pdf

John C. McAdams, *Racial Disparity and the Death Penalty,* 61 Law & Contemp. Probs. 153 (1998)

James W. McElhaney, *Trial Notebook*, 24 Litigation 55, 56 (Fall 1997)

Charles T. McCormick, McCormick On Evidence (5th ed. John W. Strong ed., 2004)

Charles T. McCormick, Handbook of the Law of Evidence 363-364 (1st Ed. 1954)

McCormick, 5 Encyc Soc. Sci. 637 (644) (1931)

Carol J. Mills & Wayne E. Bohannon, *Juror Characteristics: To What Extent are They Related to Jury Verdicts*, 64 Judicature 22, (1980)

Eileen C. Moore & Michael Paul Thomas, California Civil Practice Procedure ch. 5 § 5.7 (Thompson West Books 2006)

James Morton, *Jury Selection*, 137 New L.J. 561 (1987)

D. Moxon, Managing Criminal Justice, the Outcome of Contested Trials (D. Moxon ed., 1985)

G. Thomas Munsterman & Paul L. Hannaford, Jury Trial Innovations 83 (G. Marc Whitehead ed., 1997)

Martha Myers, *Rule Departures and Making Law: Juries And Their Verdicts*, 13 Law & Soc'y Rev. 781 (1979)

Martha Neill, *Milberg Weiss On the Hot Seat: Should Law firms Ever be Indicted?*, 92 A.B.A.J. 34 (December, 2006)

D. Nelken, *The Gap Problem in The Sociology of Law: A Theoretical Review*, 1 Windsor Yearbook of Access to Justice 35, 35-62 (1981)

Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv. L. Rev. 1357 (1985)

New York State Comptroller, Press Release 6/1/06

News Release, Office of the Attorney General Lord Goldsmith, June 27, 2006

Bruce Nichols, *The Jury Holds CEO's to Account*, The Dallas Morning News, as carried by the Syracuse Post Standard (May 26, 2005) A-6

David M. Nocenti, *Complex Jury Trials, Due Process, and the Doctrine of Unconstitutional Complexity*, 18 Colum. J. L. & Soc. Probs 1 (1983)

Note: *Erosion of the Hearsay Rule*, 3 U. Rich. L. Rev. 89 (1969)

Note: *Improper Evidence in Non-Jury Trials: Basis for Reversal?*, 79 Harv. L. Rev. 407, n. 128 (1965)

Note: *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886 (1983)

William E. O'Brian, Jr., *Court Scrutiny of Expert Evidence: Recent Decisions Highlight the Tensions*, 7 Int'l J. Evid. & Proof 172 (2003)

James Oldham, *The History of the Special (Struck) Jury in the United States and its Relation to Voir Dire Practices, the Reasonable Cross Section Requirement, and Peremptory Challenges*, 6 William and Mary Bill of Rights Journal 623 (1998)

James Oldham, *The Origins of the Special Jury*, 50 U. Chi. L. Rev. 137 (1983)

David Ormerod, *Sounding Out Expert Voice Identification*, [2002] Crim L. R. 771, 777

David M. Paciocco, Evaluating Expert Opinion Evidence for the Purpose of Determining Admissibility, 27 C.R.. 4th 302

David M. Paciocco, Getting Away With Murder: The Canadian Criminal Justice System ch. 6 (Toronto: Irwin Hall 1999)

David M. Paciocco and Lee Steusser, The Law of Evidence (Irwin Law 2005)

Herbert L. Packer, The Limits of the Criminal Sanction 149 (Stanford, California: Stanford U. Press 1968)

Herbert L. Packer, *Two Models of The Criminal Process,* 113 U. Pa. L. Rev. 1, 10-11, 13 (1964-1965)

Anthony Paduano & Clive A. Stafford Smith, *Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987)

Chris Pamplin, *Taking Experts Out of The Court*, 154 New L.J. 1771 (2004)

Roger Park, *The Hearsay Rule and the Stability of Verdicts, A Response to Professor Nesson*, 70 Minn. L. Rev. (1986)

Miriam Peck, The Frauds (Trials Without a Jury) Bill 2006-07, Research Paper 06/57 Home Affairs Section (House of Commons Library 2006), *available at* http://www.commonsleader.gov.uk/output/page1757.asp

Peers Wreck No-Jury Fraud Trial Bid, The Guardian, *available at*, http://www.guardian.co.uk (Mar. 20, 2007)

Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991)

People Magazine, June 27, 2005 pp. 60-61

Tom Perrotta, *Circuit Affirms Ebbers Verdict*, N.Y. L.J., July 31, 2006

Richard A. Posner, The Federal Courts: Challenge and Reform, 193-94 n.1 (Harvard University Press 1996)

Julia Preston, *Juror says Her Guilty Vote was Coerced in Terror Trial*, N.Y. Times, Sept. 2, 2005 at B2

Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation*, 79 Or. L. Rev. 61 (2000)

Mike Redmayne, *Expert Evidence and Scientific Disagreement*, 30 U.C. Davis L. Rev. 1027 (1997)

Mike Redmayne, *The Relevance of Bad Character*, 61 Cambrdg. L.J. 684 (2002)

Mike Redmayne, *The Royal Commissions Proposal on Expert Evidence: A Critique*, 2 Expert Evidence 157 (1994)

Mike Redmayne, *Similar Facts, Familiar Obfuscation*, 6 Intl. J. Evid. Proof 243 (2002)

Mike Redmayne, *Theorizing Jury Reform* in Antony Duff, et al, the Trial on Trial, Vol 2 (Hart, 2006)

Michael Redmayne, *Theorizing Jury Reform*, in Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros Eds, The Trial on Trial, Vol. 2, 101-105, (2006 Oxford and Portland Press)

D. Rielly & J. Vennard, Triable-Either-Way Cases: Crown Court or Magistrates Court (Home Office Research Study 98: London: HMSO 1988)

Catherine Kohler Riessman, Narrative Analysis (Sage Press 1993)

Paul Roberts & Adrean Zuckerman, Criminal Evidence 38-39, 323 (Oxford 2004)

Paul Roberts, *Toward the Principled Reception of Expert Evidence of Witness Credibility in Criminal Trials*, 8 Int'l J. Evid. Proof 215 (2004)

Paul Roberts, *Tyres with Y: An English Perspective on Kumaho Tire and its Implications for the Admissibility of Expert Evidence*, 1 Int'l Commentary on Evidence 5 (1999), *available at* http://www.bepress.com/ice/vol1/iss2/art5

Mary Rose, *Expectations of Privacy: Jurors Views of Voir Dire Questions*, 85 Judicature 10 (2001)

Viscount Runciman, The Royal Commission on Criminal Justice ch.8, ¶¶ 26-28 (HMSO 1993)

Alec Samuels, *Trials on Indictment Without a Jury*, 68 J. Crim. L. 125 (2004)

Michael J. Saks, *What do Jury Experiments Tell Us About Jury Decisions.* 6 S. Cal. Interdisc. L.J. 1 (1997)

Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 Law & Soc. Rev. 123 (1980-81)

Michael J. Saks, *Enhancing and Restraining Accuracy in Adjudication*, 51 Law & Contemp. Probs. 243 (1988)

Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge,* 64 Va. L. Rev. 1 (1978)

Alec Samuels, *Trials on Indictment Without A Jury*, 68 Journal of Criminal Law 125 (2004)

Fernanda Santos, *Second Defendant is Guilty of Killing of College Students*, N.Y. Times, Sept. 30, 2005 at B5

A. Saunders & R. Young, Criminal Justice (London: Butterworths 1994)

Richard Seltzer, Mark A. Venuti, & Grace M. Lopes, *Juror Honesty during the Voir Dire*, 19 Crim. Just. 451 (1991)

HM Courts Service, *Control And Management Of Heavy Fraud And Other Complex Criminal Cases, available at,* http://www.justice.gov.uk/criminal/procrules_fin/contents/pd_protocol/pd_protocol.htm

Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. Crim. Law198, 224 (1984)

Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 Harv. L. Rev 1037 (1984)

Barry Scheck, Peter Neufeld, & Jim Dwyer, Actual Innocence: Five Days to Execution, and Other Dispatches From the Wrongly Convicted 161-167 (Doubleday 2000)

Michael Siegel, *Rationalizing Hearsay: A Proposal For A Best Evidence Hearsay Rule*, 72 B.U. L. Rev. 893 (1992)

David W. Shuman & Anne W. Martin, *Formal & Empirical Research on Cascaded Inference in Jurisprudence,* 17 Law & Soc. Rev. 105 (1982)

Daniel W. Shuman, Jean A. Hamilton, & Cynthia E. Daley, *The Health Effects of Jury Service,* 18 Law & Psych. Rev. 267 (Spring 1994)

Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 Psychology Public Policy & Law 242 (1997)

Michael Slackman & Margorie Connelly, *Pataki's Rating Declines Sharply in Poll of State*, N.Y. Times, Feb. 15, 2005

Gary Slapper & David Kelly, The English Legal System (7th ed., Cavendish 2004)

Douglas Smith, *The Historical and Constitutional Contents of Jury Reform*, 25 Hofstra L. Rev. 440, 440-441 (1996)

John Sopinka, Law of Evidence In Canada 143, 396 § 8 (2nd ed., Butterworths, Canada Ltd. 1999)

Jonathan R. Sorensen and James W. Marquart, *Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases,* 18 N.Y.U. Rev. L. & Soc. Change 743 (1990-1991)

F. Strodtbeck et al., *Social Status in Jury Deliberations*, 22 Am. Soc. Rev. 713 (1957)

Stacy Stowe, *Chief Guilty At Cendant In Third Trial*, N.Y. Times, Nov. 1, 2006

Stacey Stowe, *A Second Mistrial Is Declared in Fraud Case Against the Former Chairman of Cendant*, N.Y. Times, Feb. 12, 2006

David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478 (1976)

Franklin Strier, *The Educated Jury: A Proposal for Complex Litigation*, 47 DePaul L. Rev. 49 (1997)

Don Stuart, *A Review of David M. Paciocco, Getting Away With Murder: The Canadian Criminal Justice System*, 44 McGill L. J. 1049 (1999)

Scott E. Sunby, A Life and Death Decision, A Jury Weighs the Death Penalty (Palgrave Macmillan 2005)

Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. Chi. Legal F. 575 (1990)

Eleanor Swift, *One Hundred Years of Evidence Law Reform: Thayer's Triumph,* 88 Cal. L. Rev. 2437, 2449-2450 (2000)

David M. Tanovich, David M. Paciocco & Steven Skurka, Jury Selection in Criminal Trials: Skills, Science, and the Law (Irwin Law 1997)

Colin Tapper, Cross & Tapper on Evidence 49 n. 426 (10th rev. ed., LexisNexis UK 2004)

Lord Taylor, *Criminal Justice After the Royal Commission*, The Times, July 28, 1993

H.L. Teed, *The Effect of S.12 of the Canada Evidence Act upon the Accused,* 13 Crim. L. Q. 70 (1971)

James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law (Boston: Little, Brown 1898)

Cheryl Thomas and Nigel Balmer, Diversity and Fairness in Jury System, ii-iv, (2007 Ministry of Justice Research Series 2/07)

William C. Thompson, C.L. Cowan, & P.E. Ellsworth, *Death Qualifications After Wainwright v. Witt and Lockhart v. McCree*, 13 Law & Hum. Behav. 185 (1989)

William C. Thompson, *Are Juries Competent to Evaluate Statistical Evidence?*, 52 Law & Contemp. Probs. 9 (1989)

Thompson and Merriam on Juries (1882)

Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 Fordham L. Rev. 1837 (1998)

Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971)

Julie Vennard & David Riley, *The Use of Peremptory Challenge and Stand By of Jurors and Their Relationship to Trial Outcome*, [1988] Crim L. R. 731

Julie Vennard, The Outcome of Contested Trials, in David Moxon, Managing Criminal Justice 126 (David Moxon ed., 1985)

Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific Medical Issues? Some Data from Medical Malpractice*, 43 Emory L. J. 885 (1994)

Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 Brook L. Rev. 1121 (2000)

Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patients' Interests, the Contingency Fee System, Juries, And Social Policy*, 38 Loy. L.A. L. Rev. 1217 (2005)

Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 Judicature 249 (1996)

Neil Vidmar, *The Canadian Criminal Jury System: Searching for a Middle Ground*, 62 Law & Contemp. Probs. 141, 144-145, 150 (1999)

Neil Vidmar ed., World Jury Systems 53 n.4 (New York: Oxford University Press 2000)

Neil Vidmar, Sara Sun Berle, Mary Rose, & Laura F. Donnelly, *Should We Rush to Reform the Criminal Jury?*, 80 Judicature 286, 287 (1997)

Neil Vidmar, *The Performance of the American Civil Jury: An Emperical Perspective*, 40 Arizona L. Rev. 849

The View From the Jury Box, 15 National Law Journal 25 (Feb. 22, 1993)

Adam N. Volkert, *Fifth Amendment – Double Jeopardy: Two Tier Trial Systems and the Continuing Jeopardy Principle*, 75 J. Crim. L. & Criminology 653, 670 (1984)

Clive Walker, Ian Cram, & Debra Brogarth, *The Reporting of Crown Courts Proceedings and the Contempt of Court Act 1981*, 55 Mod. L. Rev. 647 (1992)

Wall Street Journal, Editorial, *Corporate Injustice*, April 6, 2006

D.P.J. Walsh, *The Use and Abuse of Emergency Legislation in Northern Ireland*, (London: Cobden Trust 1983)

Tony Ward, *Expert Testimony Issues in the U.K.*, 17 Security J. 41 (2004)

Martin Wasik, *Magistrates: Knowledge of Previous Convictions*, [1996] Crim. L. R. 851

David Weinstein, *Protecting a Jurors Right to Privacy: Constitutional Constraints and Policy Options*, 70 Temp. L. Rev. 1 (1997)

Charles H. Whitebread, & Christopher Slobogin, Criminal Procedure (3rd ed., Foundation Press, Inc. 1993)

Kyle Whitmire, *Former Alabama Governor is Found Guilty of Bribery*, N.Y. Times, June 30, 2006

J. Wigmore, Evidence § 46 (3d Ed. 1940)

John H. Wigmore, 8 Wigmore on Evidence § 2352 at 696 (McNaughton Rev. 1961) (Aspen 2005) (1905)

R. James Williams, *Grasping a Thorny Baton . . . A Trial Judge Looks at Judicial Notice and Court's Application of Social Science*, 14 Canadian Fam. L. 179 (1996)

Mary Wisniewski, *Defense In Black Case Looks Into Juror's Remark*, Chicago Sun-Times, July 17, 2007 at 12

Stephen Wooler, Review of the Investigation and Criminal Proceedings Relating to the Jubilee Line Case, June 27, 2006 (HMCPS1), *available at* http://www.hmcpsi.gov.uk/reports/JubileeLineReponly.pdf

G. William and Mary Bill of Rights Journal 623 (1998)

Michael Zander, *The Complaining Juror*, 150 New L.J. 723 (2002)

M. Zander & P. Henderson, Crown Court Study, Research Study No. 19 for the Royal Commission on Criminal Justice (1993)

ANNEX A

Thank you for taking the time to complete this questionnaire.

Please mail the completed questionnaire to:

Hon. Robert Julian
Oneida County Courthouse
200 Elizabeth Street
Utica, NY 13501

If you would like to receive information about the results of the survey send a separate e-mail to Judge Julian at rjulian@courts.state.ny.us

Judges' Questionnaire

1. For how many years have you been a judge?
   - O 1 to 5 years
   - O 6 to 10 years
   - O More than 10 years

2. Over how many trials of each type have you presided?

	0	1-49	50-99	100-200	>200
Civil Jury	O	O	O	O	O
Civil Bench	O	O	O	O	O
Criminal Jury	O	O	O	O	O
Criminal bench	O	O	O	O	O

3. In what percent of jury trials over which you preside do you agree with the jury's verdict?

	Doesn't Apply	Less Than 25%	26%-50%	51%-75%	76%-100%
Civil Jury Trials	O	O	O	O	O
Criminal Jury Trials	O	O	O	O	O

4. How often do you think attorneys consider choosing a bench trial over a jury trial?

	Very Often	Sometimes	Rarely	Never
Civil Cases	O	O	O	O
Criminal Cases	O	O	O	O

5. When counsel in a civil case decides ***NOT*** to consider or choose a bench trial, how important do you think each of the following factors is in the decision?

	Very Important	Somewhat Important	Not at all Important	Not sure/ No opinion
Uncertainty about the identity of judge who will try the case	O	O	O	O
The personality of the judge (in individual assignment parts)	O	O	O	O
Uncertainty about how the judge will apply rules of evidence in a bench trial	O	O	O	O
Concern that the judge will take an active role in questioning witnesses	O	O	O	O
Concern that bench verdicts receive less Appellate Review than jury verdicts	O	O	O	O

6. When counsel in a civil case chooses a bench trial, how important do you think each of the following factors is in the decision?

	Very Important	Somewhat Important	Not at all Important	Not sure/ No opinion
Likelihood of prompt trial	O	O	O	O
Lower cost of bench trial in terms of time and money	O	O	O	O
Complexity of the case	O	O	O	O

7. When counsel in a criminal case decide ***NOT*** to consider or choose a bench trial, how important do you think each of the following factors is in the decision?

	Very Important	Somewhat Important	Not at all Important	Not sure/ No opinion
Uncertainty about the identity of judge who will actually try the case	O	O	O	O
The personality of the judge (in individual assignment parts)	O	O	O	O
The belief that jury is more likely to be sympathetic	O	O	O	O
Uncertainty about how the judge will apply rules of evidence in a bench trial	O	O	O	O
Concern that the judge will take an active role in questioning witnesses	O	O	O	O
Concern that bench verdicts receive less Appellate Review than jury verdicts	O	O	O	O

8. When counsel in a criminal case decide to choose a bench trial, how important do you think each of the following factors is in the decision?

	Very Important	Somewhat Important	Not at all Important	Doesn't Apply
Likelihood of prompt trial	O	O	O	O
Lower cost of bench trial in terms of time and money	O	O	O	O
Complexity of the case	O	O	O	O
Nature of the Case (heinous crime or controversial issues)	O	O	O	O
Identity of the judge	O	O	O	O
Length of the trial	O	O	O	O
Unsympathetic client	O	O	O	O

9. Overall, what percentage of the cases that you try would you say are complex?

O None O 25% O 50% O 75% O All

10. When a jury decides a complex case over which you preside, about how often do you agree with the jury?

	Doesn't Apply	Less Than 25%	26%-50%	51%-75%	76%-100
Civil	O	O	OO	O	
Criminal	O	O	OO	O	

11. In the last five years what is the average number of trial days for cases over which you have presided?

	Doesn't Apply	1–5 days	6–10 days	More than 10 days
Civil Jury Trials				
Complex	O	O	O	O
Not Complex	O	O	O	O
Civil Bench Trials				
Complex	O	O	O	O
Not Complex	O	O	O	O
Criminal Jury Trials				
Complex	O	O	O	O
Not Complex	O	O	O	O
Criminal Bench Trials				
Complex	O	O	O	O
Not Complex	O	O	O	O

12. How often you think that a trial judge engages in the following activities before trial?

	Very Often	Once in a while	Never	Not sure
Reading the file prior to pretrial				
Civil Jury Trials	O	O	O	O
Civil Bench Trials	O	O	O	O
Criminal Jury Trials	O	O	O	O
Criminal Bench Trials	O	O	O	O
Offer opinions about the likely outcome of the case	Very Often	Once in a while	Never	Not sure
Civil Jury Trials	O	O	O	O
Civil Bench Trials	O	O	O	O
Criminal Jury Trials	O	O	O	O
Criminal Bench Trials	O	O	O	O
Conducting a substantive pretrial for settlement purposes	Very Often	Once in a while	Never	Not sure
Civil Jury Trials	O	O	O	O
Civil Bench Trials	O	O	O	O
Criminal Jury Trials	O	O	O	O
Criminal Bench Trials	O	O	O	O
Deciding substantive motions that include potentially prejudicial or inadmissible information	Very Often	Once in a while	Never	Not sure
Civil Jury Trials	O	O	O	O
Civil Bench Trials	O	O	O	O
Criminal Jury Trials	O	O	O	O
Criminal Bench Trials	O	O	O	O

13. When you preside over a trial, how many of the witnesses do you generally question?

	Every Witnesses	Most Witnesses	Some Witnesses	Do Not Question Witnesses
Civil Jury Trials	O	O	O	O
Civil Bench Trials	O	O	O	O
Criminal Jury Trials	O	O	O	O
Criminal Bench Trials	O	O	O	O

14. If you question witnesses, how often would you say you

	Very Often	Once In a While	Never
a) Ask a question that is objected to	O	O	O
b) Give a cautionary charge after your questions	O	O	O
c) Give a cautionary charge about your questions at the end of the trial	O	O	O

15. In your opinion, would you say that judges generally apply

a) Apply rules of evidence the same way in bench trials as in jury trials?

O Yes O No O Don't Know O Not Applicable

b) Apply rules regarding testimonial hearsay the same way in bench trials in jury trials?

O Yes O No O Don't Know O Not Applicable

c)Apply rules regarding documentary hearsay the same way in bench trials as in jury trials?

O Yes O No O Don't Know O Not Applicable

16. What's your opinion about relaxing the present New York State hearsay rule?

O Favor O Oppose

17. What's your opinion about having a rule permitting trial judges to impose time limits on the parties during trials? O Favor O Oppose

18. Have you had jurors with special training or expertise on a trial where you believed their expertise was relevant to the case? O Yes O No

IF YES:

a) Did you give a special instruction given about juror's expertise?

O Yes O No

b) Did the jury reach a verdict? O Yes O No

c) Did you talk with the jury after the trial verdict was rendered?

O Yes O No

IF YES: Based on what the jurors told you do you feel that the juror's expertise made him/her an expert in the jury room?

O Yes O No

IF YES: Do you think the juror's expertise had an impact on the verdict O Yes O No

Thank you for taking the time to complete this questionnaire.

Please mail the completed questionnaire to:

Hon. Robert Julian
Oneida County Courthouse
200 Elizabeth Street
Utica, NY 13501

If you would like to receive information about the results of the survey send a separate e-mail to Judge Julian at rjulian@courts.state.ny.us

ANNEX B

Thank you for taking the time to complete this questionnaire.

Please mail the completed questionnaire to:

Hon. Robert Julian
Oneida County Courthouse
200 Elizabeth Street
Utica, NY 13501

If you would like to receive information about the results of the survey send a separate e-mail to Judge Julian at rjulian@courts.state.ny.us

Attorney Questionnaire

1. For how many years have you been an attorney?

   O 1 to 5 years
   O 6 to 10 years
   O More than 10 years

2. In how many trials of each type have you participated?

	0	1-49	50-99	100-200	>200
Civil Jury	O	O	O	O	O
Civil Bench	O	O	O	O	O
Criminal Jury	O	O	O	O	O
Criminal bench	O	O	O	O	O

3. Is your practice predominantly O Civil O Criminal

4. Is your practice predominantly in O State Court O Federal Court

5. A) For Attorneys whose practice is predominantly **CIVIL**:

   Please estimate what percent of your civil trials are resolved through.
   (Total should equal 100.)
   _____Settlement without adjudication
   _____Bench trial (with or without subsequent settlement)
   _____Arbitration
   _____Jury Trial (with or without subsequent settlement)
   _____(Total should equal 100.)

B) For Attorneys whose practice is predominantly **CRIMINAL**:

Please estimate what percent of the criminal trials are resolved through.
(Total should equal 100%).
_____Plea
_____Jury Trial
_____(Total should equal 100.)

6. Please check the characteristics below that apply to the most recent case you tried to verdict

O Jury Trial	O State Court	O Civil
O Bench Trial	O Federal Court	O Criminal

7. If the most recent cases you tried was a civil case, what type of case?
O Tort
O Medical Malpractice
O Product Liability
O Contract
O Business Fraud
O Other Explain: _____

8. If the most recent cases you tried was a criminal case, what type of case?
O Violent crime
O White collar crime
O Drug case
O Other Explain: _____

9. Overall, what percentage of the cases that you try would you say are complex?
O None O 25% O 50% O 75% O All

10. In the last five years what has been the average number of trial days for cases in which you were involved?

	Doesn't Apply	1-5 days	6-10 days	More than 10 days
Jury Trials				
Complex	O	O	O	O
Not Complex	O	O	O	O

	Doesn't Apply	1–5 days	6–10 days	More than 10 days
Bench Trials				
Complex	O	O	O	O
Not Complex	O	O	O	O

11. How often do you consider seeking a bench trial?

O Most of the time O Sometimes O Very rarely O Never

12. If you consider seeking a bench trial **most of the time** or **sometimes**, how important are the following factors in your decision to seek a bench trial?

	Very Important	Somewhat Important	Not at all Important	Doesn't Apply
Likelihood of prompt trial	O	O	O	O
Lower cost of bench trial in terms of time and money	O	O	O	O
Complexity of the case	O	O	O	O
Nature of the Case (heinous crime or controversial issues)	O	O	O	O
Identity of the Judge	O	O	O	O
Length of the trial	O	O	O	O
Unsympathetic Client	O	O	O	O

13. If you rarely or never consider seeking a bench trial, how important are the following factors in your decision NOT to seek a bench trial?

	Very Important	Somewhat Important	Not at all Important	Doesn't Apply
Uncertainty about the identity of judge who will actually try the case	O	O	O	O
The personality of the judge (in individual assignment parts)	O	O	O	O
The belief that jury is more likely to be sympathetic	O	O	O	O
Uncertainty about how the judge will apply rules of evidence in a bench trial	O	O	O	O
Concern that the judge will take an active role in questioning witnesses	O	O	O	O
Concern that bench verdicts receive less Appellate Review than jury verdicts	O	O	O	O
Federal rules requiring prosecutor's consent	O	O	O	O

14. In your experience, how often do trial judges engage in the following activities before trial?

	Very Often	Once in a while	Never	Not sure
Reading the file prior to pretrial				
Jury Trials	O	O	O	O
Bench Trials	O	O	O	O
Offering opinions about the likely outcome of the case				
Jury Trials	O	O	O	O
Bench Trials	O	O	O	O
Conducting a substantive pretrial for settlement purposes				
Jury Trials	O	O	O	O
Bench Trials	O	O	O	O
Deciding substantive motions that include potential prejudicial or inadmissible information				
Jury Trials	O	O	O	O
Bench Trials	O	O	O	O

15. In your experience, how active are judges in questioning witnesses during trials? Generally do judges question...

	All Witnesses	Most Witnesses	Some Witnesses	No Witnesses	Doesn't Apply
Civil Jury Trials	O	O	O	O	O
Civil Bench Trials	O	O	O	O	O
Criminal Jury Trials	O	O	O	O	O
Criminal Bench Trials	O	O	O	O	O

16. In your trial experience, how strictly would you say that judges apply the rules of evidence relating to.... (Circle the number that applies.)

	Not at all				Very Strictly
Testimonial hearsay	O 1	O 2	O 3	O 4	O 5
Documentary hearsay	O 1	O 2	O 3	O 4	O 5
Prior bad acts	O 1	O 2	O 3	O 4	O 5
Prior criminal record	O 1	O 2	O 3	O 4	O 5
Disclosure/discovery compliance	O 1	O 2	O 3	O 4	O 5
Expert Testimony based on Daubert or Frye	O 1	O 2	O 3	O 4	O 5

17. Based on your own trial experience, would you say that judges generally.....

Apply rules of evidence the same way in bench trials as in jury trials?
O Yes O No O Don't Know O Not Applicable

Apply rules regarding testimonial hearsay the same way in bench trials as in jury trials?
O Yes O No O Don't Know O Not Applicable

Apply rules regarding documentary hearsay the same way in bench trials as in jury trials?
O Yes O No O Don't Know O Not Applicable

18. What's your opinion about relaxing the present New York State hearsay rule?
O Favor O Oppose

19. What's your opinion about a having a rule permitting trial judges to impose time limits on the parties during trials? O Favor O Oppose

20. Have you had jurors with special training or expertise on a trial where you believed their expertise was relevant to the case? O Yes O No

IF YES:
a) Did the judge give a special instruction given about juror's expertise?
O Yes O No
b) Did the jury reach a verdict? O Yes O No
c) Did you talk with the jury after the trial verdict was rendered?
O Yes O No

IF YES: Based on what the jurors told you do you feel that the juror's expertise made him/her an expert in the jury room? O Yes O No

IF YES : Do you think the juror's expertise had an impact on the verdict O Yes O No

21. In what percent of trials in which you have been involved in the last five years, have you agreed with the verdict?

	Doesn't Apply	Less Than 25%	26% - 50%	51% - 75%	76% - 100%
Bench	O	O	O	O	O
Jury	O	O	O	O	O

Thank you for taking the time to complete this questionnaire.

Please mail the completed questionnaire to:

Hon. Robert Julian
Oneida County Courthouse
200 Elizabeth Street
Utica, NY 13501

If you would like to receive information about the results of the survey send a separate e-mail to Judge Julian at rjulian@courts.state.ny.us

Annex C

Summary Statistics for Attorney and Judge Questionnaires

Experience				
		Attorney	Judge	Total
Experience	1 to 5 years	1	14	15
	6 to 10 years	0	17	17
	More than 10 years	41	49	90
Total		42	80	122

# Civil Jury Trials				
		Attorney	Judge	Total
# Civil Jury		1	8	9
	0	1	4	5
	1-49	26	32	58
	50-99	6	10	16
	100-200	3	13	16
	>200	5	13	18
Total		42	80	122

# Civil Bench Trials				
		Attorney	Judge	Total
# Civil Bench				
	0	1	5	6
	1-49	33	39	72
	50-99	2	8	10
	100-200	1	5	6
	>200	1	13	14
Total		42	80	122

Criminal Jury Trials

		Attorney	Judge	Total
# Criminal Jury	No Answer	9	9	18
	0	7	13	20
	1-49	23	30	53
	50-99	3	7	10
	100-200	0	12	12
	>200	0	9	9
Total		42	80	122

Criminal Bench Trials

		Attorney	Judge	Total
# Criminal Bench	No Answer	9	17	26
	>200	0	6	6
	0	18	14	32
	100-200	0	3	3
	1-49	15	35	50
	50-99	0	5	5
Total		42	80	122

Judge Agree with Civil Jury Verdict

		Attorney	Judge	Total
Judge Agree Civil Jury Verdict	No Answer	42	4	46
	26%-50%	0	2	2
	51%-75%	0	13	13
	76%-100%	0	52	52
	Don't Apply	0	9	9
Total		42	80	122

Judge Agree with Criminal Jury Verdict

		Attorney	Judge	Total
Judge Agree Criminal Jury Verdict	No Answer	42	7	49
	51%-75%	0	6	6
	76%-100%	0	50	50
	Don't Apply	0	17	17
Total		42	80	122

How often attorneys consider Civil Bench Trials

		Attorney	Judge	Total
Consider Civil Bench	No Answer	42	7	49
	Never	0	1	1
	Rarely	0	26	26
	Sometimes	0	37	37
	Very Often	0	9	9
Total		42	80	122

How often attorneys consider Criminal Bench trials

		Attorney	Judge	Total
Consider Criminal Bench	No Answer	42	13	55
	Never	0	1	1
	Rarely	0	41	41
	Sometimes	0	18	18
	Very Often	0	7	7
Total		42	80	122

Judges were asked to determine importance of factors in considering or choosing a bench trial for both civil and criminal cases. Attorneys were only asked generally the importance of the following factors in considering or choosing a bench trial. Therefore, the frequencies are reported separately. Judges' responses appear first followed by the attorney responses.

Factors Against Choosing a Civil Bench Trial: Identity of Judge

		Attorney	Judge	Total
Civil: Judge ID	No Answer	42	4	46
	Does Not Apply	0	11	11
	Not at All Important	0	11	11
	Somewhat Important	0	27	27
	Very Important	0	27	27
Total		42	80	122

Factors Against Choosing a Civil Bench Trial: Judge's Personality

		Attorney	Judge	Total
Civil: Judge Personality	No Answer	42	3	45
	Does Not Apply	0	10	10
	Not at All Important	0	8	8
	Somewhat Important	0	32	32
	Very Important	0	27	27
Total		42	80	122

Factors Against Choosing a Civil Bench Trial: Application of Rules of Evidence

		Attorney	Judge	Total
Civil: Apply Evid rules	No Answer	42	4	46
	Does Not Apply	0	9	9
	Not at All Important	0	25	25
	Somewhat Important	0	30	30
	Very Important	0	12	12
Total		42	80	122

Factors Against Choosing a Civil Bench Trial: Judge active

		Attorney	Judge	Total
Civil: Judge active	No Answer	42	3	45
	Does Not Apply	0	14	14
	Not at All Important	0	31	31
	Somewhat Important	0	30	30
	Very Important	0	2	2
Total		42	80	122

Factors Against Choosing a Civil Bench Trial: Less Appellate Review

		Attorney	Judge	Total
Civil: Less Appellate	No Answer	42	3	45
	Does Not Apply	0	20	20
	Not at All Important	0	35	35
	Somewhat Important	0	16	16
	Very Important	0	6	6
Total		42	80	122

Factors For Choosing a Civil Bench Trial: Promptness

		Attorney	Judge	Total
Civi: Prompt	No Answer	42	3	45
	Does Not Apply	0	6	6
	Not at All Important	0	10	10
	Somewhat Important	0	37	37
	Very Important	0	24	25
Total		42	80	122

Factors For Choosing a Civil Bench Trial: Cost

		Attorney	Judge	Total
Civil: Cost	No Answer	42	4	46
	Does Not Apply	0	6	6
	Not at All Important	0	12	12
	Somewhat Important	0	37	37
	Very Important	0	21	21
Total		42	80	122

Factors For Choosing a Civil Bench Trial: Complexity of Case

		Attorney	Judge	Total
Civil: Complexity	No Answer	42	3	45
	Does Not Apply	0	5	5
	Not at All Important	0	3	3
	Somewhat Important	0	36	36
	Very Important	0	33	33
Total		42	80	122

Factors Against Choosing a Criminal Bench Trial: Identity of Judge

		Attorney	Judge	Total
Criminal: Judge ID	No Answer	42	4	46
	Does Not Apply	0	11	11
	Not at All Important	0	15	15
	Somewhat Important	0	19	19
	Very Important	0	31	31
Total		42	80	122

Factors Against Choosing a Criminal Bench Trial: Personality of Judge

		Attorney	Judge	Total
Criminal: Judge Pers	No Answer	42	5	47
	Does Not Apply	0	11	11
	Not at All Important	0	4	4
	Somewhat Important	0	28	28
	Very Important	0	32	32
Total		42	80	122

Factors Against Choosing a Criminal Bench Trial: Jury more sympathetic

		Attorney	Judge	Total
Criminal: Jury more sympat	No Answer	42	4	46
	Does Not Apply	0	11	11
	Not at All Important	0	2	2
	Somewhat Important	0	28	28
	Very Important	0	35	35
Total		42	80	122

Factors Against Choosing a Criminal Bench Trial: Application of Rules of Evidence

		Attorney	Judge	Total
Criminal: Apply evid rules	No Answer	42	6	48
	Does Not Apply	0	11	11
	Not at All Important	0	27	27
	Somewhat Important	0	33	33
	Very Important	0	3	3
Total		42	80	122

Factors Against Choosing a Criminal Bench Trial: Judge active

		Attorney	Judge	Total
Criminal: Judge active	No Answer	42	4	46
	Does Not Apply	0	11	11
	Not at All Important	0	36	36
	Somewhat Important	0	26	26
	Very Important	0	3	3
Total		42	80	122

Factors Against Choosing a Criminal Bench Trial: Less Appellate Review

		Attorney	Judge	Total
Criminal: Less Appellate	No Answer	42	4	46
	Does Not Apply	0	14	14
	Not at All Important	0	43	43
	Somewhat Important	0	15	15
	Very Important	0	4	4
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Promptness

		Attorney	Judge	Total
Criminal: Prompt	No Answer	42	5	47
	Does Not Apply	0	9	9
	Not at All Important	0	32	32
	Somewhat Important	0	22	22
	Very Important	0	12	12
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Cost

		Attorney	Judge	Total
Criminal: Cost	No Answer	42	7	49
	Does Not Apply	0	8	8
	Not at All Important	0	36	36
	Somewhat Important	0	20	20
	Very Important	0	9	9
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Complexity of Case

		Attorney	Judge	Total
Criminal: Complexity	No Answer	42	5	47
	Does Not Apply	0	7	7
	Not at All Important	0	10	10
	Somewhat Important	0	34	34
	Very Important	0	24	24
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Nature of Case

		Attorney	Judge	Total
Criminal: Nature of Case	No Answer	42	5	47
	Does Not Apply	0	6	6
	Not at All Important	0	4	4
	Somewhat Important	0	23	23
	Very Important	0	42	42
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Identity of Judge

		Attorney	Judge	Total
Criminal: Judge ID	No Answer	42	5	47
	Does Not Apply	0	7	7
	Not at All Important	0	3	3
	Somewhat Important	0	21	21
	Very Important	0	44	44
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Trial length

		Attorney	Judge	Total
Criminal: Trial length	No Answer	42	5	47
	Does Not Apply	0	6	6
	Not at All Important	0	28	28
	Somewhat Important	0	39	39
	Very Important	0	2	2
Total		42	80	122

Factors For Choosing a Criminal Bench Trial: Unsympathetic client

		Attorney	Judge	Total
Criminal: Unsympathetic client	No Answer	42	5	47
	Does Not Apply	0	6	6
	Not at All Important	0	2	2
	Somewhat Important	0	38	38
	Very Important	0	29	29
Total		42	80	122

Factors Against Choosing a Bench Trial: Identity of Judge				
		Attorney	Judge	Total
Judge ID		16	80	96
	Does Not Apply	7	0	7
	Not at All Important	2	0	2
	Somewhat Important	4	0	4
	Very Important	13	0	13
Total		42	80	122

Factors Against Choosing a Bench Trial: Personality of Judge				
		Attorney	Judge	Total
Judge Personality		16	80	96
	Does Not Apply	2	0	2
	Not at All Important	6	0	6
	Somewhat Important	7	0	7
	Very Important	11	0	11
Total		42	80	122

Factors Against Choosing a Bench Trial: Jury More Sympathetic				
		Attorney	Judge	Total
Jury more sympathetic		16	80	96
	Does Not Apply	4	0	4
	Not at All Important	5	0	5
	Somewhat Important	9	0	9
	Very Important	8	0	8
Total		42	80	122

Factors Against Choosing a Bench Trial: Application of Rules of Evidence				
		Attorney	Judge	Total
Rules of Evidence		16	80	96
	Does Not Apply	3	0	3
	Not at All Important	11	0	11
	Somewhat Important	10	0	10
	Very Important	2	0	2
Total		42	80	122

Factors Against Choosing a Bench Trial: Judge Active				
		Attorney	Judge	Total
Judge active		16	80	96
	Does Not Apply	5	0	5
	Not at All Important	11	0	1
	Somewhat Important	6	0	6
	Very Important	4	0	4
Total		42	80	122

Factors Against Choosing a Bench Trial: Less Appellate Review				
		Attorney	Judge	Total
Less Appellate		16	80	96
	Does Not Apply	2	0	2
	Not at All Important	13	0	13
	Somewhat Important	8	0	8
	Very Important	3	0	3
Total		42	80	122

Factors For Choosing a Bench Trial: Promptness				
		Attorney	Judge	Total
Prompt		17	80	97
	Does Not Apply	1	0	1
	Not at All Important	10	0	10
	Somewhat Important	13	0	13
	Very Important	1	0	1
Total		42	80	122

Factors For Choosing a Bench Trial: Cost				
		Attorney	Judge	Total
Cost		18	80	98
	Does Not Apply	2	0	2
	Not at All Important	12	0	12
	Somewhat Important	5	0	5
	Very Important	5	0	5
Total		42	80	122

Factors For Choosing a Bench Trial: Complexity of Case				
		Attorney	Judge	Total
Complexity		17	80	97
	Does Not Apply	0	0	0
	Not at All Important	1	0	1
	Somewhat Important	8	0	8
	Very Important	16	0	16
Total		42	80	122

Factors For Choosing a Bench Trial: Nature of Case				
		Attorney	Judge	Total
Nature of Case		18	80	98
	Does Not Apply	7	0	7
	Not at All Important	0	0	0
	Somewhat Important	9	0	9
	Very Important	8	0	8
Total		42	80	122

Factors For Choosing a Bench Trial: Identity of Judge				
		Attorney	Judge	Total
Judge ID		17	80	22
	Does Not Apply	1	0	1
	Not at All Important	0	0	0
	Somewhat Important	8	0	8
	Very Important	16	0	16
Total		42	80	122

Factors For Choosing a Bench Trial: Trial Length				
		Attorney	Judge	Total
Trial length		18	80	98
	Does Not Apply	1	0	1
	Not at All Important	9	0	9
	Somewhat Important	12	0	12
	Very Important	2	0	2
Total		42	80	122

Factors For Choosing a Bench Trial: Unsympathetic Client				
		Attorney	Judge	Total
Unsympathetic client		18	80	98
	Does Not Apply	6	0	6
	Not at All Important	1	0	1
	Somewhat Important	11	0	11
	Very Important	6	0	6
Total		42	80	122

Complex Trials				
		Attorney	Judge	Total
Complex Trials	No Answer	2	0	2
	None	0	3	3
	25%	5	52	57
	50%	6	15	21
	75%	17	6	23
	All	12	4	16
Total		42	80	122

Agree Complex Criminal				
		Attorney	Judge	Total
Agree Complex Criminal	No Answer	42	17	59
	L 25%	0	1	1
	26%-50%	0	1	1
	51%-75%	0	7	7
	76%-100%	0	32	32
	Don't Apply	0	22	22
Total		42	80	122

Agree Complex Civil

		Attorney	Judge	Total
Agree Complex Civil	No Answer	42	6	48
	26%-50%	0	4	4
	51%-75%	0	21	21
	76%-100%	0	35	35
	Don't Apply	0	14	14
Total		42	80	122

Average Number Trial Days: Civil Jury Complex

		Attorney	Judge	Total
Average Number Trial Days: Civil Jury Complex	No Answer	42	3	45
	1 - 5 Days	0	4	4
	6 - 10 Days	0	35	35
	More than 10 Days	0	19	19
	Doesn't Apply	0	19	19
Total		42	80	122

Average Number Trial Days: Civil Jury Not Complex

		Attorney	Judge	Total
Average Number Trial Days: Civil Jury Not Complex	No Answer	42	4	46
	1 - 5 Days	0	47	47
	6 - 10 Days	0	10	10
	More than 10 Days	0	6	6
	Doesn't Apply	0	13	13
Total		42	80	122

Average Number Trial Days: Civil Bench Complex

		Attorney	Judge	Total
Average Number Trial Days: Civil Bench Cplx	No Answer	42	3	45
	1 - 5 Days	0	24	24
	6 - 10 Days	0	23	23
	More than 10 Days	0	3	3
	Doesn't Apply	0	27	27
Total		42	80	122

Average Number Trial Days: Civil Bench Not Complex

		Attorney	Judge	Total
Average Number Trial Days: Civil Bench Not Complex	No Answer	42	9	51
	1 - 5 Days	0	53	53
	6 - 10 Days	0	3	3
	More than 10 Days	0	3	3
	Doesn't Apply	0	12	12
Total		42	80	122

Average Number Trial Days: Criminal Jury Complex

		Attorney	Judge	Total
Average Number Trial Days: Criminal Jury Complex	No Answer	42	11	53
	1 - 5 Days	0	4	4
	6 - 10 Days	0	16	16
	More than 10 Days	0	14	14
	Doesn't Apply	0	35	35
Total		42	80	122

Average Number Trial Days: Criminal Jury Not Complex

		Attorney	Judge	Total
Average Number Trial Days: Criminal Jury Not Complex	No Answer	42	13	55
	1 - 5 Days	0	25	25
	6 - 10 Days	0	8	8
	More than 10 Days	0	4	4
	Doesn't Apply	0	30	30
Total		42	80	122

Average Number Trial Days: Criminal Bench Complex

		Attorney	Judge	Total
Average Number Trial Days: Criminal Bench Complex	No Answer	42	11	53
	1 - 5 Days	0	21	21
	6 - 10 Days	0	6	6
	More than 10 Days	0	3	3
	Doesn't Apply	0	39	39
Total		42	80	122

Average Number Trial Days: Criminal Bench Not Complex

		Attorney	Judge	Total
Average Number Trial Days: Criminal Bench Not Complex	No Answer	42	10	52
	1 - 5 Days	0	36	36
	More than 10 Days	0	1	1
	Doesn't Apply	0	33	33
Total		42	80	122

NOTE TO READERS: For the next 16 questions response categories were set up left to right from "Very Often" to "Not Sure"

Read File Prior: Civil Jury

		Attorney	Judge	Total
Read File Prior: Civil Jury	Never	0	4	4
	No Answer	42	1	43
	Not Sure	0	12	12
	Once in a While	0	19	19
	Very Often	0	44	44
Total		42	80	122

Read File Prior: Civil Bench				
		Attorney	Judge	Total
Read File Prior: Civil Bench	No Answer	42	3	45
	Not Sure	0	9	9
	Never	0	1	1
	Once in a While	0	12	12
	Very Often	0	55	55
Total		42	80	122

Read File Prior: Criminal Jury				
		Attorney	Judge	Total
Read File Prior: Criminal Jury	No Answer	42	7	49
	Not Sure	0	16	16
	Never	0	4	4
	Once in a While	0	10	10
	Very Often	0	43	43
Total		42	80	122

Read File Prior: Criminal Bench				
		Attorney	Judge	Total
Read File Prior: Criminal Bench	No Answer	42	10	52
	Not Sure	0	13	13
	Never	0	5	5
	Once in a While	0	6	6
	Very Often	0	46	46
Total		42	80	122

Offer Opinions: Civil Jury				
		Attorney	Judge	Total
Offer Opinions: Civil Jury	No Answer	42	1	43
	Not Sure	0	11	11
	Never	0	8	8
	Once in a While	0	39	39
	Very Often	0	21	21
Total		42	80	122

Offer Opinions: Civil Bench				
		Attorney	Judge	Total
Offer Opinions: Civil Bench	No Answer	42	2	44
	Not Sure	0	11	11
	Never	0	33	33
	Once in a While	0	27	27
	Very Often	0	7	7
Total		42	80	122

Offer Opinions: Criminal Jury				
		Attorney	Judge	Total
Offer Opinions: Criminal Jury	No Answer	42	9	51
	Not Sure	0	21	21
	Never	0	16	16
	Once in a While	0	27	27
	Very Often	0	7	7
Total		42	80	122

Offer Opinions: Criminal Bench

		Attorney	Judge	Total
Offer Opinions: Criminal Bench	No Answer	42	7	49
	Not Sure	0	20	20
	Never	0	32	32
	Once in a While	0	18	18
	Very Often	0	3	3
Total		42	80	122

Substantive: Civil Jury

		Attorney	Judge	Total
Substantive: Civil Jury	No Answer	42	1	43
	Not Sure	0	5	5
	Never	0	1	1
	Once in a While	0	9	9
	Very Often	0	64	64
Total		42	80	122

Substantive: Civil Bench

		Attorney	Judge	Total
Substantive: Civil Bench	No Answer	42	2	44
	Not Sure	0	5	5
	Never	0	8	8
	Once in a While	0	16	16
	Very Often	0	49	49
Total		42	80	122

Substantive: Criminal Jury				
		Attorney	Judge	Total
Substantive: Criminal Jury	No Answer	42	8	50
	Not Sure	0	12	12
	Never	0	5	5
	Once in a While	0	13	13
	Very Often	0	42	42
Total		42	80	122

Substantive: Criminal Bench				
		Attorney	Judge	Total
Substantive: Criminal Bench	No Answer	42	8	50
	Not Sure	0	15	15
	Never	0	8	8
	Once in a While	0	13	13
	Very Often	0	36	36
Total		42	80	122

Decide Motions: Civil Jury				
		Attorney	Judge	Total
Decide Motions: Civil Jury	No Answer	42	3	45
	Not Sure	0	9	9
	Never	0	2	2
	Once in a While	0	29	29
	Very Often	0	37	37
Total		42	80	122

Decide Motions: Civil Bench

		Attorney	Judge	Total
Decide Motions: Civil Bench	No Answer	42	4	46
	Not Sure	0	10	10
	Never	0	5	5
	Once in a While	0	29	29
	Very Often	0	32	32
Total		42	80	122

Decide Motions: Criminal Jury

		Attorney	Judge	Total
Decide Motions: Criminal Jury	No Answer	42	10	52
	Not Sure	0	19	19
	Never	0	1	1
	Once in a While	0	8	8
	Very Often	0	42	42
Total		42	80	122

Decide Motions: Criminal Bench

		Attorney	Judge	Total
Decide Motions: Criminal Bench	No Answer	42	10	52
	Not Sure	0	20	20
	Never	0	1	1
	Once in a While	0	15	15
	Very Often	0	34	34
Total		42	80	122

NOTE TO READERS: In Judge Questionnaire scale was from left to right: Every Witness, Some Witness, Do not question witnesses. In attorney questionnaire scale was from left to right: All, Most, Some, No Witness and Doesn't Apply.

Witnesses Questioned: Civil Jury

		Attorney	Judge	Total
Witnesses Questioned: Civil Jury	No Answer	3	3	6
	Every / All Witnesses	0	1	1
	Most Witnesses	1	5	6
	Some Witnesses	25	35	60
	No / Do Not Question Witnesses	13	36	49
Total		42	80	122

Witnesses Questioned: Civil Bench

		Attorney	Judge	Total
Witnesses Questioned: Civil Bench	No Answer	7	3	10
	Doesn't Apply	1	0	1
	Every/All Witnesses	0	1	1
	Most Witnesses	7	13	20
	Some Witnesses	26	46	72
	No / Do Not Question Witnesses	1	17	18
Total		42	80	122

Witnesses Questioned: Criminal Jury

		Attorney	Judge	Total
Witnesses Questioned: Criminal Jury	No Answer	20	13	33
	Doesn't Apply	9	0	9
	Every Witness	0	1	1
	Most Witnesses	1	2	3
	Some Witnesses	8	21	29
	No/Do Not Question Witness	4	43	47
Total		42	80	122

Witnesses Questioned: Criminal Bench

		Attorney	Judge	Total
Witnesses Questioned: Criminal Bench	No Answer	22	17	39
	Don't Apply	11	0	11
	Every Witness	0	1	1
	Most Witnesses	1	6	7
	Some Witnesses	8	30	38
	Do Not Question Witnesses	0	26	26
Total		42	80	122

Objected Questions

		Attorney	Judge	Total
Objected Questions	No Answer	42	8	50
	Never	0	39	39
	Once While	0	33	33
Total		42	80	122

Cautionary Charge After Questions

		Attorney	Judge	Total
Cautionary Charge After Questions	No Answer	42	10	52
	Never	0	39	39
	Once While	0	21	21
	Very Often	0	10	10
Total		42	80	122

Cautionary Charge End of Trial

		Attorney	Judge	Total
Cautionary Charge End of Trial	No Answer	42	10	52
	Never	0	28	28
	Once While	0	11	11
	Very Often	0	31	31
Total		42	80	122

Apply Rules of Evidence – Same in Bench and Jury

		Attorney	Judge	Total
Same Application Rules of Evidence	No Answer	1	0	1
	Don't Know	3	4	7
	No	32	28	60
	Yes	6	48	54
Total		42	80	122

Apply Rules of Testimonial Hearsay – Same in Bench and Jury

		Attorney	Judge	Total
Same Application Rules of Testimonial Hearsay	No Answer	1	0	1
	Don't Know	3	5	8
	No	31	32	63
	Yes	7	43	50
Total		42	80	122

Apply Rules of Document Hearsay - Same in Bench and Jury

		Attorney	Judge	Total
Same Application Rules of Document Hearsay	No Answer	1	0	1
	Don't Know	3	3	6
	No	29	24	53
	Yes	9	53	62
Total		42	80	122

Opinion re relaxing NYS Hearsay rule

		Attorney	Judge	Total
Opinion re relaxing NYS Hearsay rule	No Answer	6	2	8
	Favor	12	35	47
	Oppose	24	43	67
Total		42	80	122

Opinion re time limits

		Attorney	Judge	Total
Opinion re time limits	No Answer	26	1	27
	Favor	13	46	59
	Oppose	3	33	36
Total		42	80	122

Jurors with expertise

		Attorney	Judge	Total
Jurors with expertise	No Answer	1	0	1
	No	21	28	49
	Yes	20	52	72
Total		42	80	122

Special instruction about the juror

		Attorney	Judge	Total
Special instruction about the juror	No Answer	22	24	46
	No	13	10	23
	Yes	7	46	53
Total		42	80	122

Jury reach a verdict

		Attorney	Judge	Total
Jury reach a verdict	No Answer	22	27	49
	No	3	2	5
	Yes	17	51	68
Total		42	80	122

Talk to the jury after verdict

		Attorney	Judge	Total
Talk to the jury after verdict	No Answer	22	27	49
	No	8	23	31
	Yes	12	30	42
Total		42	80	122

Expert in the Jury Room

		Attorney	Judge	Total
Expert in the Jury Room	No Answer	31	46	77
	No	6	25	31
	Yes	5	9	14
Total		42	80	122

Impact on the Verdict

		Attorney	Judge	Total
Impact on the Verdict	No Answer	32	58	90
	No	3	12	15
	Yes	7	10	17
Total		42	80	122

Practice				
		Attorney	Judge	Total
Practice	No Answer	0	80	80
	Civil	36	0	36
	Criminal	6	0	6
Total		42	80	122

Practice				
		Attorney	Judge	Total
Practice	No Answer	2	80	82
	Federal Court	20	0	20
	State Court	20	0	20
Total		42	80	122

Arbitration		
		Attorney
Arbitration	0	3
	1	3
	2	4
	3	1
	5	13
	10	2
	12	1
	20	3
	25	1
Total		31

Bench Trial		
		Attorney
Bench Trial	0	7
	1	4
	2	3
	3	2
	5	6
	6	1
	8	1
	10	4
	13	1
	15	1
	25	1
	30	2
Total		33

Civil Jury Trial

		Attorney
Civil Jury Trial	0	3
	1	1
	2	3
	3	2
	4	1
	5	4
	8	2
	9	1
	10	7
	15	3
	17	1
	20	2
	25	2
	45	1
	59	1
	65	1
	75	1
Total		36

Settlement

		Attorney
Settlement	5	1
	10	1
	24	1
	25	1
	60	4
	70	4
	75	5
	80	1
	85	4
	90	9
	95	4
Total		35

Type of Trial				
		Attorney	Judge	Total
Type of Trial	No Answer	4	80	84
	Bench Trial	9	0	9
	Jury Trial	29	0	29
Total		42	80	122

Type of Court				
		Attorney	Judge	Total
Type of Court	No Answer	15	80	95
	Federal Court	12	0	12
	State Court	15	0	15
Total		42	80	122

Type of Case				
		Attorney	Judge	Total
Type of Case	No Answer	17	80	97
	Civil	20	0	20
	Criminal	5	0	5
Total		42	80	122

Type of Civil Case				
		Attorney	Judge	Total
Type of Civil Case	No Answer	7	80	87
	Business Fraud	4	0	4
	Contract	7	0	7
	Medical Malpractice	5	0	5
	Other	8	0	8
	Product Liability	3	0	3
	Tort	8	0	8
Total		42	80	122

Civil Explanation				
		Attorney	Judge	Total
Civil Explanation		32	80	112
	antitrust	2	0	2
	breach of noncompete agreement	1	0	1
	Bus Accident	1	0	1
	charitable foundation	1	0	1
	employment discrimination	1	0	1
	Federal Securities laws	1	0	1
	IP	1	0	1
	Lanham Act, false advertising	1	0	1
	Legal malpractice	1	0	1
Total		42	80	122

Type of Criminal Case

		Attorney	Judge	Total
Type of Criminal Case	No Answer	35	80	115
	Other	1	0	1
	White Collar Crime	6	0	6
Total		42	80	122

Criminal Explanation

		Attorney	Judge	Total
Criminal Explanation	No Answer	38	80	118
	I have never tried a criminal	1	0	1
	L. Dennis Kozlowski - CEO Tyco	1	0	1
	Securities fraud	1	0	1
	tax	1	0	1
Total		42	80	122

Average Number Trial Days: Jury Complex

		Attorney	Judge	Total
Average Number Trial Days: Jury Complex	No Answer	4	80	84
	1 - 5 Days	5	0	5
	6 - 10 Days	12	0	12
	Doesn't Apply	5	0	5
	More than	16	0	16
Total		42	80	122

Average Number Trial Days: Jury N Complex				
		Attorney	Judge	Total
Average Number Trial Days: Jury N Complex	No Answer	16	80	96
	1 - 5 Days	11	0	11
	6 - 10 Days	5	0	5
	Doesn't Apply	10	0	10
Total		42	80	122

Average Number Trial Days: Bench Cplx				
		Attorney	Judge	Total
Average Number Trial Days: Bench Cplx	No Answer	16	80	96
	1 - 5 Days	5	0	5
	6 - 10 Days	6	0	6
	Doesn't Apply	7	0	7
	More than	8	0	8
Total		42	80	122

Average Number Trial Days: Bench N Cplx				
		Attorney	Judge	Total
Average Number Trial Days: Bench N Cplx	No Answer	21	80	101
	1 - 5 Days	4	0	4
	6 - 10 Days	2	0	2
	Doesn't Apply	15	0	15
Total		42	80	122

How often consider a bench trial

		Attorney	Judge	Total
How often consider a bench trial	No Answer	1	80	81
	Most of the time	6	0	6
	Never	4	0	4
	Sometimes	18	0	18
	Very rarely	13	0	13
Total		42	80	122

Federal Rules requiring Prosecutor Consent

		Attorney	Judge	Total
Federal Rules requiring Prosecutor Consent	No Answer	18	80	98
	Does Not Apply	17	0	17
	Not at All Important	3	0	3
	Somewhat Important	2	0	2
	Very Important	2	0	2
Total		42	80	122

Read File Prior: Jury

		Attorney	Judge	Total
Read File Prior: Jury	No Answer	2	80	82
	Not sure	2	0	2
	Never	1	0	1
	Once in a While	17	0	17
	Very Often	20	0	20
Total		42	80	122

Read File Prior: Bench

		Attorney	Judge	Total
Read File Prior: Bench	No Answer	7	80	87
	Not sure	4	0	4
	Once in a While	11	0	11
	Very Often	20	0	20
Total		42	80	122

Offer Opinions: Jury

		Attorney	Judge	Total
Offer Opinions: Jury	No Answer	2	80	82
	Never	5	0	5
	Once in a While	24	0	24
	Very Often	11	0	11
Total		42	80	122

Offer Opinions: Bench

		Attorney	Judge	Total
Offer Opinions: Bench	No Answer	7	80	87
	Not sure	4	0	4
	Never	15	0	15
	Once in a While	14	0	14
	Very Often	2	0	2
Total		42	80	122

Substantive: Jury

		Attorney	Judge	Total
Substantive: Jury	No Answer	3	80	83
	Never	3	0	3
	Once in a While	16	0	16
	Very Often	20	0	20
Total		42	80	122

Substantive: Bench

		Attorney	Judge	Total
Substantive: Bench	No Answer	8	80	88
	Not sure	2	0	2
	Never	9	0	9
	Once in a While	15	0	15
	Very Often	8	0	8
Total		42	80	122

Decide Motions: Jury

		Attorney	Judge	Total
Decide Motions: Jury	No Answer	2	80	82
	Not sure	1	0	1
	Never	7	0	7
	Once in a While	11	0	11
	Very Often	21	0	21
Total		42	80	122

Decide Motions: Bench

		Attorney	Judge	Total
Decide Motions: Bench	No Answer	7	80	87
	Not sure	5	0	5
	Never	8	0	8
	Once in a While	12	0	12
	Very Often	10	0	10
Total		42	80	122

Rules Applied: Testimony Hearsay

		Attorney	Judge	Total
Rules Applied: Testimony Hearsay		1	80	81
	2	3	0	3
	3	10	0	10
	4	25	0	25
	5	3	0	3
Total		42	80	122

Rules Applied: Document Hearsay

		Attorney	Judge	Total
Rules Applied: Document Hearsay		1	80	81
	1	1	0	1
	2	4	0	4
	3	16	0	16
	4	17	0	17
	5	3	0	3
Total		42	80	122

Rules Applied: Prior Bad Acts

		Attorney	Judge	Total
Rules Applied: Prior Bad Acts		13	80	93
	2	2	0	2
	3	11	0	11
	4	12	0	12
	5	4	0	4
Total		42	80	122

Rules Applied: Prior Criminal Record

		Attorney	Judge	Total
Rules Applied: Prior Criminal Record		16	80	96
	3	7	0	7
	4	13	0	13
	5	6	0	6
Total		42	80	122

Rules Applied: Disclosure/Discovery

		Attorney	Judge	Total
Rules Applied: Disclosure/Discovery		3	80	83
	1	3	0	3
	2	5	0	5
	3	17	0	17
	4	12	0	12
	5	2	0	2
Total		42	80	122

Rules Applied: Daubert or Frye

		Attorney	Judge	Total
Rules Applied: Daubert or Frye	No Answer	3	80	83
	2	8	0	8
	3	18	0	18
	4	11	0	11
	5	2	0	2
Total		42	80	122

Agreed with Verdict: Bench

		Attorney	Judge	Total
Agreed with Verdict: Bench	No Answer	7	80	87
	51% - 75%	11	0	11
	76% - 100%	15	0	15
	Doesn't Apply	7	0	7
	Less Than 25%	2	0	2
Total		42	80	122

Agreed with Verdict: Jury

		Attorney	Judge	Total
Agreed with Verdict: Jury	No Answer	6	80	86
	26% - 50%	5	0	5
	51% - 75%	7	0	7
	76% - 100%	18	0	18
	Doesn't Apply	5	0	5
	Less Than 25%	1	0	1
Total		42	80	122

ANNEX D

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	05 CR 727 - 1,2,3,5	DATE	3/16/2007
CASE TITLE	USA vs. Conrad Black, John Boultbee, Peter Atkinson and Mark Kipnis		

DOCKET ENTRY TEXT

Juror Questionnaire filed.

■[For further details see text below.] Notices mailed by Judge's staff

STATEMENT

NAME: _____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**No. 05 CR 727**
	)	
CONRAD M. BLACK, et al.	)	**Hon. Amy J. St. Eve**

JUROR QUESTIONNAIRE

You have been summoned by this Court for jury selection. The case for which you have been summoned for jury selection is a criminal case entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis, and The Ravelston Corporation Limited ("Ravelston")*. In the indictment, defendants Black, Boultbee, Atkinson, Kipnis, and Ravelston are charged with various alleged offenses related to the conduct of the affairs of Hollinger International, Inc. Each of the defendants has pled not guilty to the charges alleged.

As part of the jury selection process, each of you must complete this juror questionnaire. The questions on this form are asked to assist the Court and the attorneys in the jury selection process for this trial. This questionnaire is designed to obtain information about your background as it relates to your possible service as a fair and impartial juror in this case. Its use will avoid the necessity of asking each prospective juror every one

STATEMENT

of these questions in open Court, thereby substantially shortening the jury selection process. Unless the question states otherwise, the fact that a particular question is asked does not imply that the subject matter of the question is an issue in this case. As you read the questions, you are not to draw any inferences about the issues which must be decided in this case.

The questions are not meant to invade your privacy, but to help select a fair and impartial jury for this case. If there is any reason why you might not be able to give both sides a fair trial in this case, it is important to say so. Please answer each question as fully as you can. Your complete honesty is essential. Do not leave any questions blank. If a question does not apply to you in any way, write "N/A" (for "not applicable"), rather than leaving the form blank. If you do not understand the question, please write that in the space for the answer. If you feel the answer is too personal, please say so in the space provided. You will have the opportunity to discuss your answer privately. If you do not understand a question, need more space for your response, or wish to make further comments about any question, please use the extra sheet attached to the back of the questionnaire. If you use the explanation sheets, please make sure to indicate which numbered question you are answering. **DO NOT WRITE ON THE BACK ON ANY PAGE.**

STATEMENT

You are instructed not to discuss this case or questionnaire with anyone, including your family or fellow jurors. It is important that your answers be yours and yours alone.

Your answers are confidential. They will be reviewed by the judge and the lawyers in this case. Following jury selection, the original questionnaire will be kept under seal and will be disclosed, if at all, with names and other identifying information removed. There may be some questions that touch on matters that you consider personal, private or other wise sensitive. In order to select a fair and impartial jury, however, it is important that the Court and the lawyers have your complete and truthful answers to these kinds of questions. If there are certain questions you prefer not to answer in writing (even though the document remains confidential), please so indicate and the judge will discuss it with you in private at a later time.

Please print your name on the cover page, and upon completion, sign your name on the last page where indicated. If possible print your answers and use ink only. You are expected to sign your questionnaire, and your answers will be given the same effect as a statement given to the Court under oath.

An indictment is merely an accusation. It is proof of nothing. You may draw no inference against any defendant from the fact that he has been indicted. Each defendant has pleaded "not guilty" to each of the charges against him/it and he/it is presumed innocent. A defendant does not have to prove anything. The government bears the burden of proving the guilt of each defendant beyond a reasonable doubt.

Judge Amy St. Eve is the trial judge in this case. Once the jury is selected, generally this case will be tried from approximately 9:30 a.m. to 5:00 p.m., Monday through Thursday each week. You typically will have Fridays off from court. If you are expected to be here on a Friday, Judge St. Eve will let you know in advance. The next phase of the jury selection process will begin on March 14, 2007 at 9:00 a.m., and will continue until completed. During this phase, you will likely be asked follow-up questions by the judge based on your responses to this questionnaire. You will have the opportunity to answer any of these questions in private. To determine whether you will be required to report on Wednesday, March 14, or one day shortly thereafter, you must call 1-800-572-4210 and key in your participant number when indicated (your participant number is located to the right of your name on the summons.) The message will inform you which day and time to appear. The opening statements and presentation of the evidence in the trial will begin after the jury selection process is completed. The trial is expected to last 12 to 16 weeks from the commencement of opening statements. This is just an estimate and the time frame could change a bit depending on the circumstances of the case.

Thank you for your time and cooperation.

1. Name : _____
(First) (Middle Initial) (Last) (Maiden, if applicable)

2. Sex: _____

STATEMENT

3. Date of Birth: _____ Age: _____

4. Where were you born and raised? _____

5. What city/town/village and county do you currently live in?

_____

(city/town) (zip code) (county)

6. If you live in the Chicago area, what is the name of your neighborhood, if any (for example, Streeterville, Jefferson Park, etc.)? _____

7. Are you currently: (check all that apply)

Married __ (Since _____) Divorced ____ (Since _____)
Separated _ (Since _____) Widowed ____ (Since _____)
Single, Never Married __
Living With a Partner/Significant Other _ (Since _____)

8. Do you have any medical issues, mental impairments or physical problems (for example, sight, hearing, or back) that may affect your ability to understand the evidence or would make it difficult for you to sit for long periods?

□ Yes □ No
If yes, please describe:

9. If you have children or stepchildren, please list for each child (include children and stepchildren who do not live with you), his or her sex, age, where they reside, education level, and (if applicable) occupation.

Sex Age
City of Residence
Education Level
Occupation and Employer (or if in college, their school attended and degree sought)

STATEMENT

10. Please provide the following information about your parents (and your stepparents, if any):

	City of Residence	Retired?	Occupation/Employment? (before retirement or death, if applicable)
Father			
Mother			
Stepfather			
Stepmother			

11. (a) How long have you lived at your current address? ___ years

(b) Which of the following best describes your type of residence?

_____ Rental apartment _____Own home
_____ Rental house _____Own apartment/condo/townhome
_____ Rental (other) _____Own mobile home
_____ Other (specify) _____

12. In what other cities, towns, or areas have you lived during the past 10 years, and how long did you live there? (Please note if you have lived in another country or state.)

	STATEMENT
13.	If you live with persons other than your spouse/partner and/or children/stepchildren, please explain their relationship to you (for example, roommate or parent) and their occupation:
14.	What is the name of your current employer, your job title and job description? (Or, if you are no longer employed, list your last employer, job title and job description.)

(a) How many years have you worked at your current/last job? _____ Years

(b) Regarding your employment, please check all that apply to you at this time:

_____Part-time	_____Unemployed
_____Full-time	_____Self-employed
_____Work at home	_____Family Farm
_____Homemaker	_____Own Business
_____Retired	_____Disabled
_____Student	_____Other (please describe)_____

(c) Please briefly describe what you do on the job on a typical work day:

(d) Do/did you have management or supervisory duties? □ Yes □ No

(e) Are you/were you supervised by others at your job? □ Yes □ No

(f) Do/did you have authority to hire and fire employees? □ Yes □ No

(g) Will you be paid by your employer during jury service? □ Yes □ No

If yes, for how many days? ____

15. Please list prior occupations and employers, if any during the last ten years:

Job Employer How long employed there?

16. Have you or anyone close to you ever worked for any of the following?

_____State, City or County office/dept./agency
_____Illinois Department of Corrections
_____Federal government office/dept./agency
_____Other government agency/office
_____Police department
_____Law firm
_____State or Federal court
_____Other Law Enforcement

If you checked any of the above, please describe the person involved, the agency or organization involved and the nature of the employment:

17. Have you or anyone close to you ever owned a business?

□ Yes □ No

(a) If Yes, briefly describe the type and size of the business:

STATEMENT

(b) If Yes, was the business ever bought or sold by you or anyone close to you ?

□ Yes □ No

If Yes, briefly describe:

18. Have you or anyone close to you ever had any training, education, or been employed in the newspaper industry?

□ Yes □ No

If yes, please explain:

19. Have you or anyone close to you ever been employed in or had any training or education in any aspect of the legal field?

□ Yes □ No

If yes, please explain:

(a) Have you ever hired or consulted with a lawyer for any reason?

□ Yes □ No

If yes, please describe:

(b) If yes, were you satisfied with your representation?

□ Yes □ No

If your answer is yes OR no, please describe:

(c) Do you have business dealings with attorneys in the normal course of your work?

□ Yes □ No
If yes, please describe:

(d) How many attorneys have you known fairly well?_____

(e) Are you or anyone close to you now employed, or ever been employed, by a law firm or office?

□ Yes □ No

If Yes, please list each employer and briefly describe the nature of your employment:

20. Have you or anyone close to you ever been employed in the accounting profession?

□ Yes □ No
If yes, please describe:

(a) How many accountants or auditors have you known fairly well?_____

(b) Do you have business dealings with accountants or auditors in the normal course of your work?

□ Yes □ No
If yes, please describe:

STATEMENT

21. What is your highest education level?

☐ Grammar school ☐ Some high school ☐ High school diploma/GED
☐ Trade or technical school
☐ Subject studied and degree: _____

Some college Major/Degree: _____ School attended _____
College degree Major/Degree: _____ School attended _____
Graduate school Major/Degree: _____ School attended _____

22. Do you have any plans to attend school in the future? ☐ Yes ☐ No If Yes, please explain:

23. Describe any special training or skills that you have (for example as a welder, auto mechanic, or cook):

24. Have you or any immediate members of your family ever served in any branch of the armed forces of the United States (including military reserve or ROTC)?

☐ Yes ☐ No

If Yes, please answer the following and identify if the person is you or a member of your family:

(a) What branch of service:

(b) When did you or your relative serve:

(c) Highest rank achieved:

(d) Occupational specialty:

(e) Duties:

(f) Place of service:

(g) Did you or this person see combat?

(h) Have you or any of your family members participated in a Court Martial?

□ Yes □ No

(i) If Yes, when, where and under what circumstances:

(j) What type of discharge did you or that person receive?

25. Have you or anyone close to you received training, education or had work experience in any of the following fields:

_____ Accounting/auditing
_____ Bookkeeping
_____ Finance
_____ Prisons/correctional facilities
_____ Shareholders' Rights
_____ Newspaper/Television or other media
_____ Banking
_____ Business
_____ Law enforcement
_____ Stock Brokerage
_____ Real Estate (including appraisals)

If you checked any of the choices above, please explain in detail:

26. What are your primary leisure activities, hobbies and interests?

	STATEMENT
27.	What charitable, civic, social, union, professional, fraternal, political, recreational or religious organizations do you and/or your significant other volunteer for; belong to; participate in; donate money, time or services to; or hold offices in?
28.	Spouse or Significant Other -- Please complete the following questions regarding your spouse/ significant other. (If you are (Please check): _____Widowed _____Divorced or _____ Separated and currently not married, please complete the following questions regarding your former spouse.) (a) Spouse's/significant other's age: ____ (b) What is the highest level of education your spouse or significant other completed? _ Grade school or less _ Some high school _ High school graduate _____ Technical or business school _____ Less than 2 years of college _____ More than 2 years of college _____ College graduate _____ Post graduate degree (c) Spouse's/significant other's current employment status or former employment status (if deceased): _____ Employed full-time _____ Employed part-time _____ Homemaker _____ Student

STATEMENT
_____ Unemployed - looking for work _____ Unemployed - not looking for work _____ Retired

(d) What is her/his occupation (Note - If your spouse or significant other is retired, unemployed or deceased, please answer the following questions as regards his/her last employment).

(e) Who is his her employer (or is he or she self-employed)?

(f) How long has or did she/he worked there?

(g) Please describe her/his job:

(h) Does he or she supervise any other employees? If Yes, please explain:

(i) Please list any other jobs she/he has had as an adult for the last 5 years. If your spouse/significant other is retired or deceased, please list the jobs she/he held for the last 10 years before retirement or death.

Job title Employer How long employed there?

29. Have you or anyone close to you ever been employed by Hollinger International, Inc., or any of its subsidiaries, affiliates or partnerships, including the *Chicago Sun Times*?

□ Yes □ No

If yes, please explain:

STATEMENT

30. Do you follow the news on a regular basis? □ Yes □ No

(a) If yes, check all the news you follow on a regular basis.

___World news
___Local news
___Sports news
___Other news (specify _____)
_____Domestic (US) news
_____Business/financial news
_____Entertainment news

(b) What is the most important source of news for you? (Check only one)

___ Newspapers
___ Radio
___ Friends and family
_____ TV
_____ Magazines
_____ Internet

(c) Which newspapers do you read regularly, including both local and out-of-town papers?

(d) How often do you read a newspaper?

___ Every day
___ Once or twice a week
___ Never
_____ Several times a week
_____ Less often than once a week

(e) Which television programs do you watch on a regular basis?

(f) Do you watch financial news programs or networks (for example, CNBC and Bloomberg) or visit financial news websites (for example, Yahoo! Finance, Money.com, CNN-FN, CFO.com) or read the financial/business news (for example, the business pages of your local newspaper) on a regular basis?

□ Yes □ No

STATEMENT
(g) Which magazines do you read regularly?
(h) Which radio programs do you listen to on a regular basis?
31. Are you a regular user of the internet? ☐ Yes ☐ No
(a) If yes, what do you use the internet for?
(b) If you get news from the internet, what websites do you frequently visit?
32. If you are selected as a juror in this case, the Court will instruct you not to read, listen to or watch any news media accounts of the trial, including those on the internet.
(a) Will you have any difficulties following this instruction?
(b) This case may receive media attention during trial. Does this matter in any way to you? ☐ Yes ☐ No If Yes, please explain:
33. Have you or anyone close to you ever:
(a) Been arrested, charged with or convicted of a crime? ☐ Yes ☐ No

(b) Appeared as a witness before any federal, state or district court, grand jury or government body or agency (including any legislative committee)? ☐ Yes ☐ No

(c) Sued or been sued by anyone? ☐ Yes ☐ No

(d) If you checked Yes for any of the above, please explain here.

34. Was there any sort of court hearing in the matters you described in the preceding question? ☐ Yes ☐ No

If Yes, did you or the person close to you, testify at that court hearing? ☐ Yes ☐ No

(a) If Yes, who testified?

(b) If Yes, how did you or the person close to you, feel about the experience?

35. Have you or anyone close to you ever been asked to testify in court as an expert witness, or as a witness with special knowledge or training?

☐ Yes ☐ No

If yes, please describe:

36. Have you or anyone close to you been the victim of, or witness to, any kind of crime, whether it was

reported to law enforcement authorities or not?

□ Yes □ No

(a) If yes, was anyone caught? What was the outcome of the case?

(b) Have you or anyone close to you ever been the victim of fraud or another type of financial crime?

□ Yes □ No
If yes, please give details:

37. Have you or anyone close to you made or brought any claims or lawsuits against any federal, state, district or local government agency or have any claims or lawsuits ever been made by any federal, state, district, local official or government agency against you or anyone close to you?

□ Yes □ No

If Yes, please explain:

38. Are you or anyone close to you employed by a law enforcement agency (as an employee or a volunteer)?

□ Yes □ No
If yes, please describe:

(a) Have you or anyone close to you ever applied or considered applying to any law enforcement agency, or had any training, courses, or work experience in law enforcement, criminal justice, administration of justice,?

□ Yes □ No

If yes, please explain:

(b) Have you or anyone close to you ever worked for, applied to or had any experience with the Federal Bureau of Investigation, the Internal Revenue Service, the United States Postal Service, the United States Attorneys Office or the United States Securities and Exchange Commission?

□ Yes □ No

If yes, please explain:

39. Do you feel that you might give more or less weight to the testimony of agents of the federal government than to civilian witnesses?

□ Yes □ No

Please explain why or why not:

40. Do you currently, or have you ever, owned stocks (including mutual funds)?

□ Yes □ No

(a) If Yes, have you owned or are you aware of whether your mutual fund owned stock in Hollinger Inc. or Hollinger International, Inc. (which owned the *Chicago Sun Times*) at any time in the past ten years? □ Yes □ No

(b) If Yes, could you impartially consider evidence presented about Hollinger Inc., Hollinger

International, Inc. and its directors, officers and other present and former employees? ☐ Yes ☐ No

If No, please explain:

41. Have you or anyone close to you ever participated in any group concerned with crime prevention or victims' rights?

☐ Yes ☐ No

If yes, please list the organization, who participated, and any position that person holds or held:

42. Have you ever served as a juror before?

☐ Yes ☐ No

If yes, please complete for each case on which you served:

Civil or Criminal?

What were the charges or allegations?

When and where was the trial?

Did the jury reach a verdict? (Yes or No)

(a) If you have served on a jury before, were you the foreperson?

☐ Yes ☐ No

(b) Have you ever served on a grand jury or coroner's jury?

☐ Yes ☐ No

STATEMENT

If yes: When: _____

Where: _____

Kind of jury: _____

(c) How did you feel about your service as a juror?

43. Was there anything about your experience as a juror which would make you want to serve again or not want to serve again? ☐ Yes ☐ No

If Yes, please explain.

STATEMENT

THIS CASE

This case is about an alleged financial fraud at a company called Hollinger International, which was the parent company that owned the Chicago Sun Times. The defendants in this case are Conrad Black, John Boultbee, Peter Atkinson, Mark Kipnis and The Ravelston Corporation Limited ("Ravelston").

The defendants are presumed to be innocent of all charges. The defendants have pled not guilty to all charges.

The prosecution has the burden of proving each defendant guilty of each charge beyond a reasonable doubt.

44. Do you or any family members know Conrad Black, John Boultbee, Peter Atkinson or Mark Kipnis? Have you heard of The Ravelston Corporation Limited?

45. From time to time, this case has received media attention. There is nothing wrong with having heard something about this case. It is important that you truthfully and fully answer the following questions concerning your knowledge about this case.

(a) Have you seen, read or heard anything about this case or the criminal charges being brought against any of the defendants in this case: Conrad Black, John Boultbee, Peter Atkinson, Mark Kipnis, or Ravelston?

□ Yes □ No

If Yes, please describe:

(b) In general, have you formed an opinion about this case?

□ Yes □ No

If Yes, please describe:

STATEMENT

(c) If you have formed an opinion or impression about the case, will it take evidence from the defendants or the government to change that opinion or impression?

□ Yes □ No

If Yes, please describe:

46. Conrad Black is a defendant in this case. How much, if anything, have you seen, read, or heard about Conrad Black?

□ Nothing □ Some Things □ A lot

(a) What have you heard and what do you know about Conrad Black?

(b) What impressions, feelings, or opinions had you formed about Conrad Black before coming into Court today?

(c) Have you formed any opinions about the guilt or innocence of defendant Conrad Black?

If yes, please explain:

47. John Boultbee is a defendant in this case. How much, if anything, have you seen, read, or heard about John Boultbee?

□ Nothing □ Some Things □ A lot

STATEMENT

(a) What have you heard and what do you know about John Boultbee?

(b) What impressions, feelings, or opinions had you formed about John Boultbee before coming into Court today?

(c) Have you formed any opinions about the guilt or innocence of defendant John Boultbee?

If yes, please explain:

48. Peter Atkinson is a defendant in this case. How much, if anything, have you seen, read, or heard about Peter Atkinson?

□ Nothing □ Some Things □ A lot

(a) What have you heard and what do you know about Peter Atkinson?

(b) What impressions, feelings, or opinions had you formed about Peter Atkinson before coming into Court today?

STATEMENT

(c) Have you formed any opinions about the guilt or innocence of defendant Peter Atkinson?

If yes, please explain:

49. Mark Kipnis is a defendant in this case. How much, if anything, have you seen, read, or heard about Mark Kipnis?

□ Nothing □ Some Things □ A lot

(a) What have you heard and what do you know about Mark Kipnis?

(b) What impressions, feelings, or opinions had you formed about Mark Kipnis before coming into Court today?

(c) Have you formed any opinions about the guilt or innocence of defendant Mark Kipnis?

If yes, please explain:

STATEMENT

50. Ravelston (a corporation) is a defendant in this case. How much, if anything, have you seen, read, or heard about Ravelston?

□ Nothing □ Some Things □ A lot

(a) What have you heard and what do you know about Ravelston?

(b) What impressions, feelings, or opinions had you formed about Ravelston before coming into Court today?

(c) Have you formed any opinions about the guilt or innocence of defendant Ravelston?

If yes, please explain:

51. Is there anything that you have heard about this case that you feel would make it hard for you to be a fair and impartial juror in this case?

□ Yes □ No

If yes, please describe:

STATEMENT

STATEMENT
52. During this trial, you may hear testimony about the entities listed below.
American Publishing Company
American Publishing Management Services, Inc.
Bass, Berry & Sims PLC
CanWest Global Communications Corporation
Cardinal Capital Management, Inc.
Chicago Sun-Times
Community Newspaper Holdings, Inc.
Cravath, Swaine & Moore LLP
Davies, Ward, Phillips & Vineberg, LLP
Dirks Van Essen & Associates
Forum Communications Company
Groia & Company
Hollinger Canadian Newspapers, Limited Partnership
Hollinger International Publishing, Inc.
Hollinger International, Inc.
Hollinger, Inc.
Horizon Publishing Inc.
Interec Publishing Corporation
Jerusalem Post
KPMG LLP
Morgan Stanley Dean Witter & Co.
National Post
Newspaper Holdings, Inc.

STATEMENT
_____O'Melveny & Meyers LLP
Osler, Hoskins & Harcourt LLP
Osprey Media Group Inc.
Osprey Media Holdings Inc.
Paxton Media Group LLC
PMG Acquisition Corp.
Primedia Inc.
The Ravelston Corporation Ltd.
Ravelston Management Inc.
Richard C. Breeden & Co.
Shearman & Sterling
Southam, Inc.
Southam Business Communications, Inc.
Sugra Ltd.
The Telegraph Group
The Daily Telepgraph
The Sunday Telegraph
Toronto-Dominion Bank
Torys LLP
Tweedy, Browne Company LLC
Vogel Law Firm
Wachovia Bank
Winston & Strawn LLP
XSTM Holdings (2000) Inc.
Do you or anyone close to you have any personal knowledge or experience with any of them?

□ Yes □ No

If Yes, please provide the following information:

Entity or event about which you have personal knowledge
What is the source of your knowledge?
What do you know about that entity or event?

53. A list of names of possible witnesses or persons whose names might be mentioned during this trial is listed below.

William Ainely
Ralph Barford
Lance Bloomfield
Richard Breeden
David Brooks
Christopher Browne
Richard Burt
Lloyd Case
Leslie Coolidge
Lee Cooperman
Frederick A. Creasey
Monique Delorme
Beth DeMerchant
Mathew Doull
Barry Epstein
James Fabro
Duncan Forsythe
Eugene Fox, III
Alan Funk
Andrew Geist

STATEMENT
Rebecca Goldman
Steve Hall
Gabe Hayos
Paul B. Healy
Gulliaume Hecketsweiler
Thomas Henson
Roderick Hills
Craig Holick
Laura Jereski
Steven Johnson
Thomas L. Kabler
Ann Kippen
Henry A. Kissinger
Marie-Josee Kravis
Peter S. Laino
Jinyan Li
Linda Loye
Joan Maida
William Marcil
Ralph J. Martin
Roland McBride
Charles McCurdy
_____Jonathan Miller
Warren J.A. Mitchell
Lisa Morse
Kevin Murphy
Robert Musur
Alan Nadel
Ralph T. Neveille
Jennifer Owens
Christopher Paci
Gordon Paris
David Paxton
Gustavo Pedemera

STATEMENT
Richard Perle Pao Phua Kay Pishka David Power David Radler James F. Reda Michael Reed Ann Riposuanu William "Bud" Rogers Marc Rosenberg Jonathan Rosenberg Patrick Ryan Maureen J. Sabia Paul Saunders Shari Schindler Ken Serota Mahmood Shahab Robert Smith Ben Soave Marilyn Stitt Jerry Strader Brian Stevens Darren Sukonick James Thompson Barry Tyner Donald Vale Owen Van Essen Todd Vogt Angela Easterling Way James Winikates Do you or anyone close to you personally know any of these persons?

STATEMENT
□ Yes □ No

STATEMENT
If Yes, please provide the following information: Name of witness: **How do you, your family member, or your friend know this witness? How long have you, your family member, or your friend known this witness?** 54. Some individuals you may hear from or about in this case have titles such as "Lord" or "Ambassador." Would the fact that an individual held such a title cause you to view them differently?

STATEMENT
55. The attorneys and law firms expected to be involved in this case are listed below. **Attorneys**:
Donald Corbett
Jeffrey Cramer
Zachary Fardon
Terence Gillespie
Edward Genson
Richard Greenberg
Edward Greenspan
Carolyn Gurland
Ian Hochman
Patricia Brown Holmes
Jane Kelly
Marc Martin
Royal Martin
Gus Newman
Benito Romano
Julie Ruder
Ronald Safer
Michael Schachter
Edward Siskel
Deborah Steiner
Eric Sussman
Michael Swartz
Robert Tarun
Patrick Tuite
Steven Yurowitz **Law firms**:
Arnstein & Lehr
Dickstein Shapiro
Genson & Gillespie
Greenspan & White
Latham & Watkins
Martin, Brown & Sullivan
Newman & Greenberg
Schiff Hardin

STATEMENT
Schulte Roth & Zabel Willkie Farr & Gallagher Do you know any of these attorneys or firms? ☐ Yes ☐ No

STATEMENT

If Yes, please provide the following information:

Name of attorney or firm you know:

How do you know this attorney or firm?

How long have you known this attorney or firm?

56. In general, what, if any, opinions do you have about people from Canada?

57. If you heard evidence that some of the defendants in this case received tens of millions of dollars, would that fact alone cause you to believe that there must have been some type of misconduct?

If yes, please explain.

58. Do you think there should be:

- ☐ More government regulation of large corporations
- ☐ Less government regulation of large corporations
- ☐ The amount of current regulation is adequate
- ☐ No opinion

STATEMENT

59. During the case, there will be evidence about law firms that have large corporations as clients. Do you hold any views about law firms that could affect your view of evidence in this case?

□ Yes □ No
If yes, please describe:

60. During the case, there will be evidence about practices in which a person or corporation may set up a transaction to obtain better tax treatment. Do you hold any views about such practices that could affect your view of evidence in this case?

□ Yes □ No
If yes, please describe:

61. During the case, there will be evidence about the practice of obtaining, in connection with a business transaction, so-called "non-competition agreements" (also sometimes called "covenants not to compete").

(a) Have you ever signed a non-competition agreement (or covenant not to compete) or been asked to sign one?

□ Yes □ No

(b) Do you hold any views about such agreements that could affect your view of evidence in this case?

□ Yes □ No

STATEMENT
If yes, please describe:
62. Have you ever had anyone lie to you or mislead you in a business dealing? If yes, please describe:
63. Have you or anyone close to you ever served on a Board of Directors, or been an Officer of, any corporation, company, charitable organization or other entity? □ Yes □ No If Yes, briefly describe your responsibilities and type/size of the organization:
64. Have you ever read a Shareholder Proxy Statement, Form 10-K, Form 10-Q or Annual Shareholder's Report of a publicly traded company or corporation? □ Yes □ No If yes, please describe:
65. Have you ever lost a significant amount of money on an investment? □ Yes □ No If yes, is there anything about that experience that would cause you to pre-judge the evidence in this case?

STATEMENT

66. Have you or anyone close to you been affected by financial problems at companies where there have been allegations of wrongdoing by corporate executives?

□ Yes □ No
If yes, please describe:

67. Have you or anyone close to you been a party to any shareholder action or lawsuit against a corporation or a corporation's executives?

□ Yes □ No
If yes, please describe:

68. Have you or anyone close to you ever served on, worked for or appeared before an Audit Committee of any corporation, company, charitable organization or other entity?

□ Yes □ No
If Yes, briefly describe your responsibilities and type/size of the organization:

69. Have you ever worked with auditors or conducted an audit of any corporation, company, charitable organization or other entity?

□ Yes □ No
If yes, please describe:

STATEMENT

70. Have you ever been a member of any shareholder's rights group or executive compensation reform group?

□ Yes □ No

If yes, please describe:

71. Did you follow any of the lawsuits/prosecutions in the past few years involving WorldCom, Global Crossing, Qwest Communications, Enron, Arthur Andersen, Adelphia or Tyco?

If yes, how closely?

72. Have you ever owned stock in a company whose officers or the corporation itself have been charged with a crime?

If yes, please describe:

73. Under the United States Constitution, a person or entity accused of a crime does not have to testify in his defense or present any witnesses and his/its silence may not be used against him/it. Can you abide by this constitutional requirement?

□ Yes □ No

STATEMENT

74. Is there any matter not covered by this questionnaire that you think the attorneys or the Court might want to know about you when considering you as a juror in this case?

☐ Yes ☐ No

If yes, please describe:

75. Do you have personal, religious, philosophical or other beliefs that would make it difficult for you to sit in judgment of another?

☐Yes ☐ No

If yes, please explain

76. Is there any matter you would prefer to discuss privately?

☐ Yes ☐ No

77. Do you have difficulty reading, speaking or understanding the English language?

☐ Yes ☐ No

If Yes, please explain:

78. Is there anything else about your ability to serve as a juror that you think we should know?

☐ Yes ☐ No

If yes, please explain:

STATEMENT

STATEMENT

JUROR'S OATH

I declare under penalty of perjury that the answers set forth in this Jury Questionnaire are true and correct to the best of my knowledge and belief. I have not discussed my answers with others, or received assistance in completing the questionnaire.

_____

Signature

_____

Print Name

_____

Date

STATEMENT
Please use the space below to finish any of your answers. Please specify the number of any questions to which you are completing an answer.